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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-70012

STEVEN LAWAYNE NELSON,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:16-CV-904

FILED: June 30, 2023

Before JONES, SMITH, and DENNIS, *Circuit Judges*.

EDITH H. JONES, *Circuit Judge*:

Steven Lawayne Nelson was convicted of capital murder and sentenced to death for his involvement in the robbery and murder of a pastor. After exhausting his state remedies, Nelson filed a federal habeas petition under 28 U.S.C. § 2254 and sought investigative services under 18 U.S.C. § 3599. The district court rejected his petition for relief, concluded that investigative services were not reasonably necessary, and denied a certificate of appealability (COA). Nelson then petitioned this court for a COA. We granted that petition on a single issue: Whether Nelson's trial counsel were ineffective for failing to

investigate and present at the penalty phase of trial two alleged accomplices' participation in the robbery and murder. We hold that Nelson's attempt to reframe his Sixth Amendment counsel ineffectiveness claim in federal court does not save it from the strictures of AEDPA review, 28 U.S.C. § 2254(d). We now AFFIRM.

I.

On March 3, 2011, while tending to his ecclesiastical duties at Arlington's NorthPointe Baptist Church, Reverend Clinton Dobson was bound, savagely beaten, and then suffocated with a plastic bag. *Nelson v. State*, No. AP-76,924, 2015 WL 1757144, at *1 (Tex. Crim. App. Apr. 15, 2015). Dobson's elderly secretary, Judy Elliott, was also beaten beyond recognition and within an inch of her life. *Id.* at *1–2. A car, laptop, cellphone, and several credit cards were stolen. *Id.* Two days later, police arrested Nelson and a grand jury indicted him for capital murder based on, *inter alia*, physical evidence recovered at the scene, surveillance video showing Nelson using the victims' credit cards at a mall, and information provided by Nelson's acquaintances. *See id.* at *2–3.

At the guilt stage of Nelson's trial, the State presented impressive physical and circumstantial evidence directly linking Nelson to the crime. Nelson's fingerprints were at the murder scene, and droplets of the victims' blood were on top of Nelson's sneakers. *Id.* at *3. Moreover, distinctive white metal studs from the belt Nelson was wearing when police arrested him were found on and around Dobson's body. *Id.* at *2–3. Shortly after the murder,

Nelson was *see*n driving Elliott's car to a store, where he sold Dobson's laptop to another customer. *Id.* at *2. Video surveillance at the local mall showed Nelson using Elliott's stolen credit cards to make purchases. *Id.* Further, the day after the murder, Nelson sent a series of incriminating text messages. "One asked to *see* the recipient because '[i]t might be the last time.' Another said, 'Say, I might need to come up there to stay. I did some [stuff] the other day, Cuz.' A third said, 'I [messed] up bad, Cuz, real bad.'" *Id.* Nelson even bragged about the murder to a friend.

Against his lawyers' advice, Nelson insisted on testifying. According to Nelson, he waited outside the church to serve as a lookout while two others, Anthony Springs and Claude Jefferson, went inside to rob Dobson and Elliott.[1] *Id.* at *3. After about twenty-five minutes, Nelson entered the church and saw the victims face down and bleeding out from their heads on the floor, but still alive. *Id.* Nelson did nothing to aid the victims; instead, he robbed them, taking Dobson's laptop, Elliott's keys, and Elliott's credit cards, and then went back outside. *Id.* Later, he went back inside and saw that Dobson was dead, but quickly left because he could not stand the smell. *Id.* Nelson admitted that "he knew people were inside the church and that he agreed to rob them," he just did not know that his accomplices would kill anyone. *Id.*

Nelson's story did not square with the State's extensive evidence. For one, Nelson could not explain

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[1] When police initially confronted Nelson about the murder, he only named Springs, but not Jefferson, as his accomplice.

how droplets of the victims' blood got on the top of his shoes or how pieces of his belt broke off at the murder scene. Moreover, Springs and Jefferson each had alibis. Two witnesses and phone records placed Springs over 30 miles away during the time of the murder. A class sign-in sheet and phone records placed Jefferson in his chemistry class.

Rather than try to definitively prove Nelson's story, Nelson's trial counsel raised suspicion as to Springs's and Jefferson's involvement to undermine the State's theory that Nelson alone committed the murder. For example, Nelson's counsel challenged Springs's and Jefferson's alibis and established that police recovered DNA evidence from the crime scene that did not match the victims, Nelson, or Springs.

The trial court gave the jury a law of the parties instruction, meaning that it could return a guilty verdict if it found either that Nelson was (1) directly responsible for Dobson's murder or (2) a party to the robbery and should have anticipated that a death was likely to occur during the robbery. After deliberating, the jury found Nelson guilty of capital murder without specifying which theory it relied on. Then the court proceeded to the penalty stage.

The penalty stage was held before the same jury that convicted Nelson. To sentence Nelson to death, the jury had to first find that Nelson (1) poses a "continuing threat to society" and (2) "actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken." TEX. CODE CRIM. PROC. art. 37.071, § 2(b)(1)–(2). If the jury answered those questions in

the affirmative, then it had to consider whether mitigating circumstances warranted a "sentence of life imprisonment without parole rather than a death sentence." TEX. CODE CRIM. PROC. art. 37.071, § 2(e)(1).

At the penalty stage, the State continued to press the theme that Nelson alone murdered Dobson. Moreover, the State presented evidence that while awaiting trial Nelson murdered a fellow inmate, Johnathan Holden, vandalized jail property, smuggled weapons into the jail, and repeatedly assaulted jail personnel. *See Nelson*, 2015 WL 1757144 at *6–7. Nelson's trial counsel challenged the evidence indicating that Nelson murdered Holden. They further argued that Nelson did not deserve the death penalty because others participated in the crime. To show that, Nelson's DNA expert testified that the items used to restrain both victims contained DNA from unknown contributors. And another expert testified that hair found at the scene did not match the victims, Nelson, or Springs. Finally, Nelson's trial counsel presented a comprehensive mitigation case by calling numerous witnesses to show that Nelson's violent tendencies stemmed from mental illness and a difficult upbringing. Notwithstanding these efforts, the jury answered all three questions consistent with the death penalty and the district court sentenced Nelson to death.

Nelson next sought state habeas relief. The State appointed John Stickels, an experienced and well-credentialed criminal attorney, to represent Nelson in his state habeas petition. Among other grounds for relief, Nelson alleged that his trial counsel rendered

ineffective assistance under the Sixth Amendment at the penalty phase by failing "to adequately investigate and present mitigation evidence." In particular, he asserted that his "defense team failed to investigate [his] background, history, family, and friends and, as a result, failed to discover relevant and important mitigation evidence."

On the basis of the record, the state habeas trial court recommended denying relief. It noted that Nelson's trial counsel were "both highly experienced attorneys who were well-qualified to represent [him] at his capital-murder trial," and that they "became fully versed in and knowledgeable of the information against [him] contained in the State's file." Furthermore, "[d]ue to the allegations of the indicted capital-murder case and the subsequent allegations of [Nelson's] severe misconduct while awaiting trial, [they] knew that most of their time would be spent trying to build a strong mitigation case." Ultimately, the court concluded, Nelson's trial counsel "made a well-reasoned strategic decision based on a thorough investigation, their professional judgment, the available witness testimony, and their reliance on well-qualified experts about how to best present [Nelson's sentencing] case to the jury." The Texas Court of Criminal Appeals adopted the state habeas court's findings and conclusions and also denied relief. *See Ex parte Nelson*, No. WR-82,814-01, 2015 WL 6689512, at *1 (Tex. Crim. App. Oct. 14, 2015).

With new counsel, Nelson then filed the instant § 2254 application. Nelson again raised a single ineffective assistance of counsel claim related to his trial counsel's alleged deficient performance at

sentencing. In addition to the mitigation-related deficiencies identified in his state habeas application, Nelson asserted that his trial counsel deficiently failed to investigate, prepare, and litigate how Nelson's culpability may be diminished by Springs's and Jefferson's participation. Nelson labels this his "participation claim." Nelson maintained that his trial counsel's aggregate failure to investigate mitigation, participation, and other sentencing related issues "deprived the jury of powerful information showing that [his] life should be spared." He likewise argued prejudice—that, but for his trial counsel's cumulative deficiency in failing to investigate the various sentencing-related issues, there is a reasonable probability that Nelson's sentence would have been different. Finally, Nelson sought funding to further investigate his ineffective assistance claim.

In a thorough and painstaking opinion, the district court rejected Nelson's ineffective assistance claim. As a threshold matter, the district court held that Nelson did not procedurally default the ineffective assistance claim because he presented the same claim, albeit with fewer alleged instances of trial counsel's deficient performance, in state court. Even if the mitigation and participation based claims were distinct and the participation based claim was therefore procedurally defaulted, the district court reasoned, Nelson did not overcome that procedural default under *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 569 U.S. 413, 133 S. Ct. 1911 (2013), by showing that his state habeas counsel provided ineffective assistance. In the

alternative, the district court rejected Nelson's participation claim on the merits. The district court also denied Nelson's request for investigative services under 18 U.S.C. § 3599(f). Finally, the district court refused a COA.

Nelson then petitioned this court for a COA. This court granted Nelson's request in part. *Nelson v. Davis*, 952 F.3d 651, 670–76 (5th Cir. 2020). Noting that "reasonable jurists could debate whether Nelson's [participation] allegations 'fundamentally alter' his [ineffective assistance] claim," this court hypothesized that Nelson's participation based ineffective assistance claim may be distinct from the ineffective assistance claim raised in state court and therefore procedurally defaulted. *Id.* at 671–72. Next, this court concluded that reasonable jurists could debate whether Nelson's state habeas counsel was ineffective in failing to raise the participation claim and that, as a result, reasonable jurists could debate whether Nelson could overcome procedural default under *Martinez/Trevino*. As to the merits of Nelson's participation claim, this court reasoned that "[b]ecause Nelson's counsel sought to convince the jury that Springs and Jefferson were involved but arguably failed to take reasonable investigative steps in developing evidence in support of this argument, . . . reasonable jurists could debate that his trial counsel's performance" was deficient. *Id.* at 675. This court carried with the development of the participation claim the questions of *Strickland* prejudice and denial of funding. *Id.* at 675–76.

II.

In an appeal from a district court order denying

habeas relief, "this court reviews the district court's findings of fact for clear error and its conclusions of law de novo, applying the same standards to the state court's decision as did the district court." *Harrison v. Quarterman*, 496 F.3d 419, 423 (5th Cir. 2007) (citing *Coble v. Dretke*, 444 F.3d 345, 349 (5th Cir. 2006)).

The court "may affirm on any ground supported by the record," *Dorsey v. Stephens*, 720 F.3d 309, 314 (5th Cir. 2013) (citing *Fisher v. Texas*, 169 F.3d 295, 299 (5th Cir. 1999)), and is not bound "by the COA opinion's observations on the merits," *Trevino v. Davis*, 861 F.3d 545, 548 n.1 (5th Cir. 2017). We review the denial of funding under 18 U.S.C. § 3599 for an abuse of discretion. *Ayestas v. Davis*, 138 S. Ct. 1080, 1094 (2018).

III.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") governs federal habeas proceedings. Out of respect to "our system of dual sovereignty," AEDPA greatly restricts the availability of federal habeas relief to those convicted of crimes in state court. *Shinn v. Ramirez*, 142 S. Ct. 1718, 1730 (2022) (citing *Printz v. United States*, 521 U.S. 898, 918, 117 S. Ct. 2365, 2376 (1997) and *Brown v. Davenport*, 142 S. Ct. 1510, 1523–24 (2022)). Chief among AEDPA's federalism preserving features is the requirement that state prisoners "exhaus[t] the remedies available in the courts of the State" before *see*king federal habeas relief. 28 U.S.C. § 2254(b)(1). Generally, state prisoners satisfy "this exhaustion requirement by raising [their] federal claim before the state courts in accordance with state procedures." *Shinn*, 142 S. Ct. at 1732 (citing *O'Sullivan v.*

Boerckel, 526 U.S. 838, 848, 119 S. Ct. 1728, 1734 (1999)).

A federal court's review of a claim adjudicated in state court is circumscribed in two ways. First, the federal court may not consider any evidence beyond the state court record. *See Cullen v. Pinholster*, 563 U.S. 170, 180–81, 131 S. Ct. 1388, 1398 (2011). Second, the state prisoner must show that the state court's decision "was contrary to, or involved an unreasonable application of," law clearly established by the Supreme Court, 28 U.S.C. § 2254(d)(1), or that the decision "was based on an unreasonable determination of the facts" in light of the state court record, 28 U.S.C. § 2254(d)(2).

In contrast, if a state prisoner fails to present his federal claim in state court for adjudication or comply with state procedures, and thereby procedurally defaults the claim, then a federal court will, in all but the most extraordinary cases, decline to review it. *Shinn*, 142 S. Ct. at 1732. A prisoner may overcome such procedural default only "if he can show 'cause' to excuse his failure to comply with the state procedural rule and 'actual prejudice resulting from the alleged constitutional violation.'" *Davila v. Davis*, 137 S. Ct. 2058, 2064–65 (2017) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 84, 97 S. Ct. 2497, 2505 (1977) and *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S. Ct. 2546, 2565 (1991)). Ordinarily, "[a]ttorney ignorance or inadvertence" does not excuse procedural default "because the attorney is the [prisoner's] agent when acting, or failing to act, in furtherance of the litigation, and the [prisoner] must 'bear the risk of attorney error.'" *Coleman*, 501 U.S. at 753, 111 S. Ct.

at 2566–67 (quoting *Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645 (1986)).

A narrow exception to the general rules stated in *Shinn* exists under *Martinez* and *Trevino*. That exception allows—but does not require—a federal habeas court to excuse a state prisoner's procedural default of a "substantial" ineffective assistance of trial counsel claim where (1) state law forbids raising that claim on direct review or makes it virtually impossible to do so and (2) the prisoner can show his state habeas counsel rendered constitutionally deficient assistance by failing to raise the claim. *Trevino*, 569 U.S. at 423–24, 133 S. Ct. at 1918. In the rare case where a state prisoner successfully overcomes procedural default, the federal habeas court then considers the claimed ineffectiveness of trial counsel de novo. *Hoffman v. Cain*, 752 F.3d 430, 437 (5th Cir. 2014) (citing *Wright v. Quarterman*, 470 F.3d 581, 591 (5th Cir. 2006)). Critically, however, the federal habeas court's review is limited to the state court record. *Shinn*, 142 S. Ct. at 1734 (holding that "under § 2254(e)(2), a federal habeas court [reviewing a procedurally defaulted claim] may not conduct an evidentiary hearing or otherwise consider evidence beyond the state-court record based on ineffective assistance of state postconviction counsel").

Under AEDPA's framework, then, two procedural issues logically precede the merits of Nelson's participation claim. First, whether that claim was "adjudicated on the merits in State court proceedings" and therefore subject to the strictures of 28 U.S.C. § 2254(d). Second, if not, whether Nelson can overcome the consequent procedural default. We

address the first question and hold that Nelson's participation claim was adjudicated on the merits in state court proceedings. We pretermit the second question and "cut straight to the merits to deny his claim" in the alternative. *Murphy v. Davis*, 901 F.3d 578, 589 n.4 (5th Cir. 2018).[2]

A.

The limitations on federal habeas review contained in § 2254(d) apply to any claim "adjudicated on the merits in State court proceedings." A "claim" for AEDPA purposes is "an asserted federal basis for relief from a state court's judgment of conviction." *Gonzales v. Crosby*, 545 U.S. 524, 530, 125 S. Ct. 2641, 2647 (2005) (defining "claim" as used in § 2244(b)); *see also Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232, 127 S. Ct. 2411, 2417 (2007) ("[I]dentical words and phrases within the same statute should normally be given the same meaning."). Generally, determining whether the § 2254(d) relitigation bar applies is straightforward. On the one hand, the relitigation bar does not apply

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[2] Nelson also requested investigative services under 18 U.S.C. § 3599(f). *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022), however, makes clear that any evidence developed using those services and raised for the first time in federal court would have to comply with § 2254(e)(2)'s "stringent" requirements. *Id.* at 1735. Nelson has never argued that he could meet those requirements. Thus, we cannot conclude that the investigative services are "reasonably necessary" because Nelson will not "be able to clear [the] procedural hurdle[]" posed by § 2254(e)(2), and "the contemplated services" therefore "stand little hope of helping [Nelson] win relief." *Ayestas v. Davis*, 138 S. Ct. 1080, 1094 (2018). Accordingly, the district court did not err, much less abuse its discretion in denying relief.

where the prisoner fails altogether to present a certain claim in state court. *See Trevino*, 569 U.S. at 416–17, 133 S. Ct. at 1914–15 (applying procedural default regime rather than § 2254(d) limitations in case where state habeas counsel failed to raise ineffective assistance claim that federal habeas counsel later raised). On the other hand, the § 2254(d) limitations do apply in cases where a prisoner "fairly presented the substance of his [federal] claim to the state courts." *Nobles v. Johnson*, 127 F.3d 409, 420 (5th Cir. 1997) (citing *Picard v. Connor*, 404 U.S. 270, 275–76, 92 S. Ct. 509, 512–13 (1971)).

In cases where the support for the prisoner's federal claim evolves across the state and federal proceedings, determining whether § 2254(d)'s relitigation bar applies is more difficult. A court must then consider whether the evolved claim presented in federal court is in fact a new claim altogether, and thus excluded from § 2254(d)'s relitigation bar, or simply the old one already adjudicated in state court, in which case § 2254(d)'s relitigation bar does apply. *See Pinholster*, 563 U.S. at 186 n.10, 131 S. Ct. at 1401 n.10. To date, the Supreme Court has not identified "where to draw the line between new claims and claims adjudicated on the merits." *Id.*

Relying on this court's COA opinion, Nelson posits that when a claim raised in a federal habeas petition fundamentally alters a claim raised in the state habeas petition, it is not "adjudicated on the merits in State court proceedings" and is therefore not subject to § 2254(d)'s restrictions. *Nelson*, 952 F.3d at 671–72. A claim raised in a federal habeas petition fundamentally alters the related claim raised in a

state habeas petition, Nelson opines, where the claim presented to the federal court includes new, material factual allegations that place "the claim in a 'significantly different legal posture.'" Nelson principally relies on *Lewis v. Thaler*, 701 F.3d 783 (5th Cir. 2012), and *Escamilla v. Stephens*, 749 F.3d 380 (5th Cir. 2014), for support. Carefully read, however, neither of those cases supports Nelson's proposed standard for separating new ineffectiveness claims from those adjudicated on the merits.

Lewis addressed whether a federal habeas court could consider expert mitigation evidence offered for the first time in the federal proceedings. 701 F.3d at 789. Reasoning in light of *Pinholster*, this court eschewed a prior line of cases holding that facts and evidence raised "for the first time on federal habeas review" should be "'analyzed under the exhaustion rubric of § 2254(b),' rather than as an issue of 'factual development' under § 2254(d) and (e)." *Id.* at 789 (quoting *Dowthitt v. Johnson*, 230 F.3d 733, 745 (5th Cir. 2000)); *see also Clark v. Thaler*, 673 F.3d 410, 416–17 (5th Cir. 2012). Accordingly, the court held that it could not consider the new mitigation evidence. *Lewis*, 701 F3d. at 791. But the court did not hold that a state prisoner could avoid § 2254(d)'s limitations by presenting new evidence that fundamentally altered a claim already adjudicated in state court proceedings.

Escamilla is similarly unhelpful. That case held that where a prisoner's state habeas counsel raised a particular federal claim in state habeas proceedings, albeit ineffectively under the Sixth Amendment, *Pinholster* barred the prisoner from presenting new

evidence in federal proceedings because the original claim was adjudicated on the merits in state court proceedings. *Escamilla*, 749 F.3d at 394–95. This court did not outline a loophole around § 2254(d)'s limitations whenever newly offered evidence and legal theories "fundamentally alter" a claim previously presented to the state courts. Indeed, *Escamilla* cautioned that "once a claim is considered and denied on the merits by the state habeas court, *Martinez [v. Ryan*] is inapplicable, and may not function as an exception to *Pinholster*'s rule that bars a federal habeas court from considering evidence not presented to the state habeas court." *Escamilla*, 749 F.3d at 395 (internal citation omitted); *see also Broadnax v. Lumpkin*, 987 F.3d 400, 408–09 (5th Cir. 2021).

Even so, Nelson's argument, that the new participation aspect of the ineffective assistance claim fundamentally alters the ineffective assistance claim he litigated in the state proceedings, would fail. On this point, a careful comparison of his state and federal habeas applications is useful. In his state habeas petition, Nelson raised a single ineffective assistance of counsel claim, as he contended that his trial counsel "fail[ed] to adequately investigate and present mitigation evidence." More specifically, Nelson asserted that trial counsel "failed to investigate [his] background, history, family, and friends and, as a result, failed to discover relevant and important mitigation evidence that would have made a difference" at the penalty stage. After reviewing Nelson's habeas application, the State's reply, "all of the exhibits and materials filed by each party, and the

entire record of the trial and habeas proceedings," the state habeas court concluded that Nelson's trial counsel made a "well-reasoned" and informed strategic decision to focus on building a strong mitigation case.

Nelson's federal habeas application likewise raised a single ineffective assistance of counsel claim. He argued that his trial counsel "failed to adequately investigate, prepare, and litigate sentencing." Trial counsel's performance was constitutionally deficient, Nelson asserted, because they failed to: (1) investigate, prepare, and litigate how Nelson's culpability may be diminished by Springs's and Jefferson's participation; (2) develop evidence that Holden died of suicide rather than at the hands of Nelson; and (3) investigate and present evidence about Nelson's background and mental health. As to *Strickland*'s prejudice prong, Nelson argued that the cumulative effect of trial counsel's deficient performance prejudiced him on all three special issues at sentencing.

In both the state and federal habeas proceedings, Nelson raised a single ineffective assistance of counsel claim related to trial counsel's performance at sentencing. Nelson concedes, as he must, that both claims are "similar." There is no dispute that the "asserted federal basis for relief from [the] state court's judgment of conviction" is the same. *Crosby*, 545 U.S. at 530, 125 S. Ct. at 2647. The only difference between the claim adjudicated in the state court and the claim presented in federal court is that Nelson pointed out more instances of trial counsel's alleged deficient performance at sentencing in the

federal court claim. That is not enough to fundamentally alter the ineffective assistance claim adjudicated in the state court to place the claim in a significantly different legal posture. A state prisoner cannot aggregate alleged instances of ineffective assistance of counsel to satisfy the *Strickland* deficient performance and prejudice requirements and then disaggregate those theories to create new, unadjudicated claims and thereby circumvent § 2254(d)'s limitations.

Nelson resists this conclusion by arguing that it will produce absurd results. He hypothesizes that, by the same logic, a *Brady* claim alleging that the prosecution suppressed exculpatory forensic evidence would be "adjudicated on the merits" if in state court the prisoner raised a *Brady* claim alleging that the prosecution suppressed favorable eyewitness testimony. But Nelson confounds the distinct natures of *Strickland* and *Brady* claims. Conceptually, a *Brady* claim is specific to particular pieces of material evidence allegedly suppressed by the prosecution whereas a *Strickland* claim is specific to a particular stage of a proceeding. *Compare United States v. Brown*, 650 F.3d 581, 588–93 (5th Cir. 2011) (evaluating *Brady* claims on an item-by-item basis), *with Blanton v. Quarterman*, 543 F.3d 230, 236–48 (5th Cir. 2008) (evaluating separately state prisoner's trial counsel and appellate counsel ineffective assistance claims). Thus, this court's analysis does not produce absurd results, just the results required by § 2254(d).

Because we conclude that Nelson's ineffective assistance claim was "adjudicated on the merits in

State court proceedings," this court's review is constrained by the limitations articulated in *Pinholster* and § 2254(d). Nelson does not argue that he can overcome those limitations. On this basis, the state courts' rejection of Nelson's ineffectiveness claim did not unreasonably apply *Strickland*, nor was it an unreasonable application of the law to the facts. Nelson is not entitled to relief.

B.

Even if Nelson's participation claim were not subject to § 2254(d)'s relitigation bar and assuming, *arguendo*, he could overcome procedural default by showing ineffective assistance of state habeas counsel, he would not succeed on the merits of his ineffective assistance claim.[3] In evaluating Nelson's ineffective assistance claim, this court's review is limited to the record before the state court. *Shinn*, 142 S. Ct. at 1734. To prevail on his trial counsel ineffective assistance claim, Nelson must show (1) deficient performance that (2) resulted in prejudice at sentencing. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S Ct. 2052, 2064 (1984). We address only the prejudice component and conclude that Nelson has not met his burden.[4]

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[3] See *Murphy v. Davis*, 901 F.3d 578, 589 n.4 (5th Cir. 2018) (denying habeas relief on merits of ineffectiveness claim rather than first considering whether prisoner could overcome procedural default).

[4] This court need not address the performance component first. *See Strickland*, 466 U.S. at 697, 104 S. Ct. at 2056 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed.").

To establish prejudice, the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Critically, the "likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112, 131 S. Ct. 770, 792 (2011) (citing *Strickland*, 466 U.S. at 693, 104 S. Ct. at 2067–68). Where, as here, the "*Strickland* claim is based on an allegedly deficient sentencing investigation, the petitioner may establish prejudice by showing that 'the totality of the available mitigation evidence . . . reweigh[ed] . . . against the evidence in aggravation' creates 'a reasonable probability that at least one juror would have struck a different balance' and recommended a life sentence instead of death." *Busby v. Davis*, 925 F.3d 699, 723–24 (5th Cir. 2019) (first quoting *Sears v. Upton*, 561 U.S. 945, 955–56, 130 S. Ct. 3259, 3266 (2010) (per curiam), and then *Wiggins v. Smith*, 539 U.S. 510, 537, 123 S. Ct. 2527, 2543 (2003)).

Nelson argues that his trial counsel's failure to investigate and introduce evidence about Springs's and Jefferson's potential involvement in Dobson's murder prejudiced him at sentencing. Specifically, had trial counsel investigated and presented evidence about their involvement, "at least one juror likely would have found that either man (or both) participated in" Dobson's murder. And the state court record, he contends, is replete with evidence that supports that conclusion. For example, Nelson points to (1) grand jury and trial testimony from one witness that contradicts the timelines that Springs and

Jefferson offered as alibis, and (2) testimony from another witness that Springs's SIM card was in that witness's phone on the day of the murder. Moreover, the state court record contains extensive evidence showing that Springs and Jefferson retained proceeds of the robbery. With a more fulsome picture of Springs's and Jefferson's involvement and his own correspondingly minimal role, Nelson concludes, a juror could have concluded that his "participation or intent fell short of the standards set by the anti-parties issue, that his culpability warranted a favorable answer to the mitigation instruction, or that he would not represent a continuing threat to society."

No doubt proving that Springs or Jefferson also participated in Dobson's ghastly murder is relevant to the three special questions posed to the jury at sentencing. But that is not enough to show *Strickland* prejudice. Even if Nelson's trial counsel had further investigated Springs's and Jefferson's alibis and presented evidence about their involvement, the State's case for death on each special question would have remained unassailable. We consider each special question in turn.

First, the anti-parties question. In answering this question, the jury had to consider whether Nelson "actually caused" Dobson's death or "anticipated that a human life would be taken." TEX. CODE CRIM. PROC. art. 37.071, § 2(b)(2). At trial, the State adduced a mountain of uncontroverted evidence that strongly suggested Nelson's direct participation in Dobson's murder. Nelson's fingerprints were found on the wrist rest of Dobson's desk. Distinctive studs broke off Nelson's belt at the crime scene, indicating a

struggle. Drops of the victims' blood were found on top of Nelson's shoes, and those shoes matched a bloody print left at the scene. Nelson alone used Elliott's credit card in the ensuing days to make purchases, and he alone sold Dobson's laptop. By contrast, no physical evidence linked Springs or Jefferson with Dobson's murder. In light of this evidence, it is unlikely that evidence of Springs's and Jefferson's involvement would have made any difference in how the jury answered the anti-parties question.

More fundamentally, Nelson's own testimony severely compromised any chance for trial counsel to persuade the jury to spare Nelson's life on the anti-parties front. Nelson claimed that he acted as a lookout for Springs and Jefferson. When he entered the church, he saw Elliott and Dobson bleeding out on the floor—but still alive—and did nothing to assist them. Instead, he stole Dobson's computer, Elliott's credit cards, and her car keys and went back outside, leaving the victims defenseless with his alleged accomplices. Proving that Nelson was an accomplice, and not the primary perpetrator, of the capital murder would do nothing to falsify that he "anticipated that a human life would be taken." TEX. CODE CRIM. PROC. art. 37.071, § 2(b)(2). That the same jury had just convicted Nelson of capital murder means that the jury either concluded that Nelson was directly responsible for Dobson's murder or else that he was an accomplice to the robbery and that he should have anticipated that a death was likely to occur during the course of the robbery. Thus, even if the jury accepted Nelson's testimony at face value,

there is little reason to think any juror would have answered the anti-parties question differently, much less a substantial likelihood that any juror would have done so.

Next, the future dangerousness and mitigation questions required the jury to assess whether Nelson poses a "continuing threat to society" and whether other mitigating circumstances warrant a "sentence of life imprisonment without parole rather than a death sentence." TEX. CODE CRIM. PROC. art. 37.071, §§ 2(b)(1), (e)(1). According to Nelson's own recounting of the events, he participated in the aggravated robbery of a church during which that church's ecclesiastical leader was brutally and senselessly murdered. While in custody and awaiting trial for Dobson's murder, Nelson murdered a fellow inmate, engaged in several altercations with jail officers, repeatedly vandalized jail property, and smuggled weapons into jail. *Nelson*, 2015 WL 1757144, at *6–7. And after murdering his fellow inmate, who suffered from intellectual disabilities, Nelson "did a 'celebration dance' in the style of Chuck Berry, 'where he hops on one foot and plays the guitar.'" *Id.* at *6. Further, Nelson's own forensic psychologist "agreed that characteristics of antisocial personality disorder describe him" and that he "has many characteristics of a psychopath." *Id.* at *8. Even if Nelson's trial counsel could definitively establish Springs's or Jefferson's involvement, they had little hope of showing that Nelson did not pose a continuing threat to society or that other mitigating evidence warranted life imprisonment rather than a death sentence. Accordingly, Nelson cannot show a

substantial likelihood that a juror would have answered the future-dangerousness or mitigation questions differently had his trial counsel investigated and presented evidence of Nelson's lessened participation.

For all these reasons, Nelson cannot demonstrate a reasonable probability that at least one juror would have recommended a life sentence had his trial counsel investigated Springs's and Jefferson's involvement and presented evidence about the same at sentencing. He was not prejudiced, and his ineffective assistance of counsel claim would fail even if it were not assessed under the rigorous standards of AEDPA § 2254(d).

AFFIRMED.

JAMES L. DENNIS, *Circuit Judge*, dissenting:

I respectfully dissent from the majority's opinion affirming the district court's denial of Nelson's federal habeas petition. We previously granted Nelson a COA on his unexhausted claim that his trial counsel was ineffective for failing to investigate whether two of Nelson's friends, Anthony Springs and Claude Jefferson, committed the murder for which Nelson was convicted (the "IATC-Participation claim"). Instead of resolving the merits of Nelson's petition, we should reverse the district court's order and remand with instructions to grant Nelson's request for investigative funding to further develop his IATC-Participation claim and for a stay so that Nelson may exhaust this claim in state court.

I. Investigative Funding

Section 3599 "authorizes federal courts to provide funding to a party who is facing the prospect of a death sentence and is 'financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services.'" *Ayestas v. Davis*, 138 S. Ct. 1080, 1092 (2018) (citing 18 U.S.C. § 3599). In evaluating funding requests, courts consider whether funding is "reasonably necessary" in light of the potential merit of the applicant's claims, the likelihood that the services would render useful evidence, and the prospect that the applicant could overcome any procedural hurdles. *Id.* at 1093–94 (proposed services must be "*reasonably* necessary" for the applicant's representation."). Courts of appeals review district court funding decisions for abuse of discretion. *Ayestas v. Davis* (*Ayestas II*), 933 F.3d 384, 388 (5th Cir. 2019).

Nelson sought funding under Section 3599(f) to pursue evidence supporting his theory that Springs and Jefferson were primarily responsible for the murder. The district court denied Nelson's request, concluding—under the "substantial need" standard later rejected by the Supreme Court in *Ayestas*—that based on the evidence presented to the jury, Nelson committed the crime alone so no evidence of another's participation exists. 138 S. Ct. at 1092 (adopting "reasonably necessary" standard for funding requests brought under § 3599). But in relying on the existing evidence on the record, the district court failed to consider "the potential merit of the claims" and "the likelihood that the services will generate useful and admissible evidence." *Id.* at 1094. Nelson sought to conduct the requested investigation precisely to locate evidence that he alleges exists and could have been uncovered to support Nelson's principal theory of defense and convince the jury to spare Nelson's life at the sentencing phase. The district court thus abused its discretion in denying Nelson's request for funding because Nelson has demonstrated that further investigation is likely to reveal evidence that supports his substantial IATC-Participation claim.

Nelson's IATC-Participation claim is likely meritorious. To prevail on this claim, Nelson must demonstrate both deficient performance by his trial counsel and prejudice to the outcome of his case. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Nelson can probably show that his trial counsel was deficient in failing to reasonably develop the principal defense theory in Nelson's case—that Springs and Jefferson carried out the murder while Nelson served

as a lookout for what he believed to be a robbery. Despite the importance of evidence suggesting Springs' and Jefferson's involvement in the murder, trial counsel did not even attempt to contact either Springs or Jefferson, let alone otherwise independently verify their alibis. At sentencing, trial counsel only used the fact that DNA from an unknown person was at the scene of the crime to support this defense theory.

Moreover, on appeal Nelson identified several "red flags" that would have prompted a reasonable attorney to conduct further investigation to gather evidence of Springs' and Jefferson's involvement in the murder. *Rompilla v. Beard*, 545 U.S. 374, 391 (2005) (Counsel "could not reasonably have ignored mitigation evidence or red flags simply because they were unexpected."). As to Springs, for example, Nelson points out that trial counsel should have investigated leads suggesting that Springs obtained Dobson's property directly from the scene of the crime, Springs' alibi witnesses had motive to protect him from jail, someone else had Springs' SIM card in their phone on the day of the murder and bruising on Springs' knuckles at the time Springs was arrested was consistent with the struggle with the victims. Nelson also highlighted the weaknesses in Jefferson's alibi given that while Jefferson testified that he was taking a quiz in class at the time of the murder, the teacher of that class stated that there was no quiz that day, Jefferson often skipped class, and a classmate could have signed in for Jefferson that day. These "red flags" indicate that trial counsel's investigation was likely deficient, and that further

investigation will generate useful and admissible[1] evidence in support of Nelson's IATC-Participation claim.

Nelson can also likely show, with the aid of further factual development, that he was prejudiced by trial counsel's failure to investigate because there is a reasonable probability that the jury would not have sentenced Nelson to death if trial counsel had gathered and presented the jury with more evidence of Springs' and Jefferson's participation in the murder. In sentencing Nelson to death, the jury necessarily concluded that he "actually caused death or anticipated that death would occur," *see* TEX. CODE CRIM. PROC. ART. 37.071 § 2(b)(2), and further evidence that Springs and/or Jefferson committed the murder would have cast doubt on whether Nelson's culpability for the murder warranted the death penalty. Yet, as we noted in granting Nelson's COA, in the absence of the undiscovered evidence, the court finds itself in "something of a Catch-22" because "[w]e cannot determine whether Nelson was prejudiced without knowing what evidence could have been uncovered" in the absence of further investigation and

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[1] The government argues that additional funding could not yield admissible evidence because any evidence uncovered would be inadmissible under *Cullen v. Pinholster*, 563 U.S. 170 (2011) and 28 U.S.C. § 2254(e)(2). But *Pinholster* is irrelevant where, as explained below, Nelson's federal IATC-Participation claim is different from the IATC claim presented in his state habeas proceeding. *See* Section II; *see also Nelson v. Davis*, 952 F.3d 651, 671–72 (5th Cir. 2020) ("[N]ew evidence that 'fundamentally alters the legal claim' or places the claim in a 'significantly different legal posture' can render it a new claim that was not adjudicated on the merits by the state court.").

therefore "should not make this [prejudice] determination based solely on the record before us when he may be entitled to investigative funding to support this claim." *Nelson*, 952 F.3d at 675. Based on the deficiencies in trial counsel's performance, and the various avenues for investigation identified by Nelson, "[t]here is[] good reason to believe that, were [Nelson's] § 3599(f) motion granted, he could establish prejudice under *Strickland*." *Ayestas*, 138 S. Ct. at 1100 (Sotomayor, J., concurring).

Further factual development is likely to lead to useful and admissible evidence to support Nelson's substantial IATC-Participation, and as such, is reasonably necessary for Nelson to be adequately represented by his present counsel. We should reverse the district court's denial of Nelson's petition and remand with instructions to grant Nelson's request for investigative funding under Section 3599(f).

II. *Rhines* Stay

An order staying a federal habeas proceeding and holding it in abeyance pending a return to state court is appropriate when a petitioner brings an unexhausted claim in federal court and: "(1) the district court determines there was good cause for the petitioner's failure to exhaust his claims in state court; (2) the claim is not plainly meritless; and (3) there is no indication that the petitioner is engaging in abusive litigation tactics or intentional delay." *Young v. Stephens*, 795 F.3d 484, 495 (5th Cir. 2015) (citing *Rhines v. Weber*, 544 U.S. 269, 277–78 (2005)). The district court did not address that standard and instead summarily denied Nelson's motion in light of

its denial of Nelson's habeas petition on the merits. However, Nelson meets the standard for a stay under *Rhines*, and the district court abused its discretion in failing to issue a stay to allow Nelson to exhaust his IATC-Participation claim in state court. *Rhines*, 544 U.S. at 270 ("[I]t likely would be an abuse of discretion for a district court to deny a stay . . . if the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that he engaged in intentionally dilatory litigation tactics.").

As an initial matter, I disagree with the majority's conclusion that the IATC-Participation claim was exhausted in state court. In granting Nelson's COA on this claim, we found that Nelson's state habeas IATC claim "did not touch on Nelson's allegations in this IATC-Participation claim that undiscovered evidence indicating that he played a minimal role in the capital murder itself could have been presented to the jury." *Nelson*, 952 F.3d at 671–72. Nelson's IATC-Participation claim thus "fundamentally alters" his state court IATC claim, which only challenged whether his trial counsel sufficiently investigated his "background, history family, and friends." *See also* 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice & Procedure § 23.3c*, at 982 (4th ed. 2001) ("The controlling standard seems to be that the petitioner exhausts the factual basis of the claim as long as she did not [] 'fundamentally alter the legal claim already considered by the state courts[.]'"). The majority faults Nelson's IATC-Participation claim for also being an IATC claim yet fails to meaningfully grapple with the case-specific differences in these two

claims and the simple fact that his state habeas counsel did not raise and the state court did not adjudicate any claim based on the allegation that trial counsel failed to gather evidence of Nelson's diminished culpability for the murder. *Moore v. Quarterman*, 533 F.3d 338, 341 (5th Cir. 2008) ("Determining whether a petitioner exhausted his claim in state court is a case- and fact-specific inquiry."). Nelson's IATC-Participation claim is thus unexhausted because it was not adjudicated in state court.

Nelson meets the requirements for a *Rhines* stay to allow him to exhaust his IATC-Participation claim in state court. The first requirement—"good cause"—is satisfied when state habeas counsel is deficient in failing to raise a claim in state habeas proceedings. *Ruiz v. Quarterman*, 504 F.3d 523, 529 n.17 (5th Cir. 2007) (recognizing that the "failures" of Texas' state habeas system in affording competent state habeas representation establishes equitable good cause for a *Rhines* stay). Here, Nelson's state habeas counsel's representation was deficient in failing to raise the IATC-Participation claim during state habeas proceedings. The decision to sentence Nelson to death was predicated in part on whether Nelson intended to cause death or anticipated loss of life, *see* TEX. CODE CRIM. PROC. ART. 37.071 § 2(b)(2), and as such, any reasonably competent habeas attorney would have appreciated the importance[2] of raising the IATC-

[2] This is especially true given Nelson's testimony at trial that he acted as a lookout for his co-conspirators and thus was not substantially involved in the murder, and trial counsel's failure to verify the alibis of Springs and Jefferson.

Participation claim during the state habeas proceeding. *Trevino v. Davis*, 829 F.3d 328, 348–49 (5th Cir. 2016) (state post-conviction counsel's failure to investigate an IATC claim is deficient performance where the "[t]he deficiency in [trial counsel's] investigation would have been evident to any reasonably competent habeas attorney."). Yet not only did state habeas counsel do nothing to investigate the IATC-Participation claim, but he also spent only 4.5 hours reviewing trial counsel's records. Here, Nelson's state habeas counsel was thus deficient and such deficiency prejudiced Nelson since his underlying IATC-Participation claim is substantial.

The second *Rhines* requirement—that the underlying claim presented is not "plainly meritless"—is also satisfied. As explained above, Nelson's IATC-Participation likely has merit, especially in light of the potential evidence he might uncover if allowed to conduct further investigation into Springs' and Jefferson's role in the murder. Finally, there is no sign of "intentionally dilatory litigation tactics" on Nelson's part that might justify a district court's denial of a *Rhines* stay. *See Rhines*, 544 U.S. at 277–78. Nelson discovered the underlying bases for his IATC-Participation Claim during federal habeas counsel's investigation, and he filed his federal petition shortly thereafter. Because Nelson's IATC-Participation claim is unexhausted and Nelson has met the requirements set forth in *Rhines*, a stay is appropriate. We should reverse the district court's denial of Nelson's request for a *Rhines* stay and remand with instructions that the district court stay

this proceeding to allow Nelson to exhaust his IATC-Participation claim in state court.

III.

Because the district court should have granted Nelson funding to further develop his IATC-Participation claim and a *Rhines* stay to exhaust the claim in state court, I respectfully dissent from the majority's decision to affirm the denial of Nelson's habeas petition based on the incomplete record before it. We should instead reverse the district court's denial of Nelson's requests for funding and a stay, and remand with instructions that the district court grant Nelson's request for investigative services and stay this proceeding while Nelson returns to state court to exhaust the IATC-Participation claim.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-70012

STEVEN LAWAYNE NELSON,

Petitioner—Appellant,

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent—Appellee.

Appeal from the United States District Court for the Northern District of Texas

Before JONES, SMITH, and DENNIS, Circuit Judges.[1]

JAMES L. DENNIS, Circuit Judge:

Steven Nelson seeks a Certificate of Appealability (COA) to challenge his 2012 Texas capital conviction, alleging multiple claims of ineffective assistance of trial counsel as well as unconstitutional juror strikes under *Batson v. Kentucky*, 476 U.S. 79 (1986). Nelson also appeals the district court's denial of his motions for investigative funding under 18 U.S.C. § 3599(f) and for stay and abatement of his federal proceedings pending exhaustion of claims in state court. As discussed below, a COA is hereby GRANTED in part

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[1] Judge Jones concurs in the opinion with the exception of Part III.C and the partial grant of a COA.

and DENIED in part. We AFFIRM in part the district court's denial of Nelson's other motions and defer adjudication in part until our full consideration of the merits of Nelson's appeal.

I. Background

In 2012, Steven Nelson was convicted of the capital murder of Clinton Dobson on March 3, 2011, in Arlington, Texas. *Nelson v. State*, No. AP-76,924, 2015 WL 1757144 at *1 (Tex. Crim. App. Apr. 15, 2015). Dobson, a pastor, had been violently assaulted and then suffocated with a plastic bag, and his secretary, Judy Elliot, was badly beaten and almost did not survive. *Id.* at *1– *2. A laptop, cellphone, car, and credit cards were stolen from the victims. *Id.* Nelson was arrested and indicted after information from his acquaintances, forensic evidence from the scene, and surveillance video of him with the victims' possessions linked him to the crime. Nelson confessed that he had agreed to participate in the robbery, but denied assaulting Elliot or murdering Dobson. *Id.* at *3. A jury convicted Nelson after receiving a law-of-the-parties instruction to return a guilty verdict if it found either that Nelson had murdered Dobson or that Nelson had joined a conspiracy to commit the robbery and should have anticipated the murder of another in furtherance of that robbery.

At the punishment phase, the State provided substantial evidence of Nelson's past violence and criminal history, which the Court of Criminal Appeals of Texas ("TCCA") summarized in detail in its opinion on direct appeal. *See Nelson*, 2015 WL 1757144, at *4–7. Relevant here, punishment phase evidence included evidence that, while awaiting trial, Nelson

"killed Jonathon Holden, a mentally challenged inmate." *Id*. at *6. "According to a fellow inmate who witnessed the incident, Holden had angered inmates when he mentioned 'the N word under his voice.'" *Id*. After Nelson "talked Holden into faking a suicide attempt to cause Holden to be moved to a different part of the jail. . . . Holden came to the cell bars, and [Nelson] looped a blanket around Holden's neck." *Id*. Nelson strangled Holden, and after his death, "did a 'celebration dance' in the style of Chuck Berry," using "a broom stick, which he had previously used to poke another mentally challenged inmate in the eye, as a guitar." *Id*.

The defense at the punishment phase presented mitigation testimony from Nelson's family, a social worker who counseled him when he was a child, and Dr. Antoinette McGarrahan, a forensic psychologist hired as an expert witness to evaluate Nelson. *Id*. at *7. The state court summarized Dr. McGarrahan's mitigation testimony as follows:

> [Dr. McGarrahan] testified that, although appellant had no current learning disability or cognitive impairment, he had a past history of learning disabilities. Dr. McGarrahan explained that, when, as a three-year-old, appellant set fire to his mother's bed with intent to cause harm, it was essentially a cry for attention and security. She believed that there was "something significantly wrong with [appellant's] brain being wired in a different way, being predisposed to this severe aggressive [*sic*] and violence from a very early age." She testified that, by the time appellant

> was six years old, he had had at least three EEGs, meaning that people were already "looking to the brain for an explanation" of his behavior. The test results did not indicate a seizure disorder, but Dr. McGarrahan said that they did not rule out appellant having one. Risk factors present in appellant's life included having ADHD, a mother who worked two jobs, an absent father, verbal abuse, and witnessing domestic violence.

Id. After answering Texas's three special questions required at the capital punishment phase, the jury sentenced Nelson to death. *See* TEX. CODE CRIM. PRO. ART. 37.071.

In his direct appeal, Nelson argued, as relevant here, that the State unconstitutionally used its peremptory strikes to eliminate as jurors racial minorities. *Nelson*, 2015 WL 1757144 at *10. The TCCA denied relief. *Id.* at *15. Nelson then filed a state habeas application alleging, among other claims, ineffective assistance of trial counsel for failure to adequately investigate and present mitigating evidence from "other family members, friends, and former teachers" at the punishment phase of trial. The state court denied Nelson's claims, adopting the State's proposed findings of facts and conclusions of law without alteration. The TCCA affirmed without further reasoning. *Ex Parte Steven Lewayne Nelson*, No. WR-82,814-01, 2015 WL 6689512, at *1 (Tex. Crim. App. Oct 12, 2015).

With the assistance of different counsel, Nelson then filed the instant federal habeas action in the district court, asserting five grounds with multiple

subparts. The district court denied relief on all claims on the merits and some on the alternative grounds that they were procedurally barred, and then denied a COA. Nelson now seeks a COA on his claims that 1) his trial counsel was ineffective in failing to adequately investigate and present three different categories of mitigating evidence, 2) the State used race to select the jury in violation of *Batson*, and 3) his trial counsel was ineffective for failing to adequately litigate his *Batson* claim during voir dire.

Additionally, Nelson directly appeals the district court's denial of his three motions seeking funding for investigative services claim under 18 U.S.C. § 3599(f). Nelson also appeals the district court's denial of his motion for stay and abatement to permit him to exhaust in state court his claims of ineffective assistance of counsel and an additional claim that the State knowingly presented false testimony at the punishment phase.

II. Standard of Review

To appeal the district court's denial of his habeas claims, Nelson must first seek a COA from this court pursuant to 28 U.S.C. § 2253(c)(1). *See Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003). To obtain a COA, Nelson must demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). For a claim that the district court decided on the merits, he must show that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327 (citing *Slack v. McDaniel*, 529 U.S.

473, 484 (2000)); *see* 28 U.S.C. § 2253(c)(2). For claims denied on procedural grounds, Nelson must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Segundo v. Davis*, 831 F.3d 345, 350 (5th Cir. 2016) (quoting *Slack*, 529 U.S. at 484). The COA standard is less burdensome in capital cases, as "in a death penalty case any doubts as to whether a COA should issue must be resolved in the petitioner's favor." *Clark v. Thaler*, 673 F.3d 410, 425 (5th Cir. 2012).

When a state court has reviewed a petitioner's claim on the merits, our review is constrained by the deferential standards of review found in the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *See* 28 U.S.C. § 2254. Under these circumstances, we may not issue a COA unless reasonable jurists could debate that the state court's decision was either "contrary to, or involved an unreasonable application of, clearly established Federal law," § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," § 2254(d)(2). "For claims that are not adjudicated on the merits in the state court, however, we do not apply the deferential scheme laid out in § 2254(d) and instead apply a de novo standard of review." *Ward v. Stephens*, 777 F.3d 250, 256 (5th Cir. 2015), *abrogated on other grounds by Ayestas v. Davis*, 138 S. Ct. 1080 (2018) (citations and internal quotation marks omitted).

A petitioner does not require a COA to appeal the district court's denial of funding under § 3559(f) or denial of petitioner's motion to stay proceedings. *See Ayestas v. Stephens*, 817 F.3d 888, 895 (5th Cir. 2016), *vacated on other grounds by Ayestas v. Davis*, 138 S. Ct. 1080 (2018) (COA not required to appeal denial of funding under § 3599(f)); *Williams v. Thaler*, 602 F.3d 291, 309 (5th Cir. 2010) (COA not required to appeal denial of a motion for stay and abatement). We review the district court's denial of these motion for abuse of discretion. *Ayestas v. Davis (Ayestas II)*, 933 F.3d 384, 388 (5th Cir. 2019) (§ 3599(f)); *Williams*, 602 F.3d at 309 (stay and abatement).

III. Ineffective Assistance of Trial Counsel at the Punishment Phase

Nelson seeks a COA on claims that his trial counsel was ineffective at the punishment phase of his trial in failing to investigate and develop three different kinds of potential mitigating evidence. To prevail on a claim of ineffective assistance of counsel, Nelson must demonstrate both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Deficient performance is only that which "fell below an objective standard of reasonableness." *Id.* at 688. Courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might have been considered sound trial strategy." *Id.* (internal quotation marks omitted). However, this "does not eliminate counsel's duty to 'make reasonable investigations or to make a

reasonable decision that makes particular investigations unnecessary." *Escamilla v. Stephens*, 749 F.3d 380, 388 (5th Cir. 2014) (citing *Strickland*, 466 U.S. at 690–91). "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (citing *Strickland*, 466 U.S. at 690–91).

To satisfy the prejudice prong of an ineffective assistance of counsel claim, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

Applying this two-prong inquiry, "the Supreme Court has found that trial counsel's failure to adequately investigate available mitigating evidence . . . amounts to ineffective assistance of counsel." *Escamilla*, 749 F.3d at 388 (citing *Williams v. Taylor*, 529 U.S. 362, 395 (2000)). Moreover, "we have explained that, 'in investigating potential mitigating evidence, counsel must either (1) undertake a reasonable investigation or (2) make an informed strategic decision that investigation is unnecessary.'" *Id*. at 390 (quoting *Charles v. Stephens*, 736 F.3d 380, 389 (5th Cir.2013)). "'[T]rial counsel must not ignore pertinent venues of investigation, or even a single, particularly promising investigation lead.'" *Id*. Where "the scope and adequacy of counsel's mitigation investigation was debatably

unreasonable," we have granted a COA. *Id*. at 391 (citing *Smith v. Dretke*, 422 F.3d 269, 280 (5th Cir. 2005)).

A. Failure to Investigate and Present Mental Health History

Nelson first alleges that his trial counsel was ineffective during the punishment phase for failing to adequately investigate and present his history of childhood trauma and its impact on his mental health. We refer to this claim as Nelson's "IATC-Mental Health" claim. Nelson principally objects to counsels' decision to select Dr. Antoinette McGarrahan, a neuropsychologist, to evaluate Nelson and testify as an expert witness at the punishment phase. He contends that, despite information in counsel's possession indicating that Nelson was affected by severe trauma, counsel did not properly investigate these leads by retaining a trauma specialist or specifically instructing Dr. McGarrahan to consider whether he suffered from post-traumatic stress disorder ("PTSD"). Nelson emphasizes that counsel called Dr. McGarrahan to testify at the punishment phase even though she informed counsel before trial that "[i]f asked on cross, [she] [would] most likely agree that he has several traits associated with psychopathy," and that, on cross-examination, she in fact conceded that Nelson "has many, many psychopathic characteristics."

Nelson argues that, had counsel properly investigated his abusive past and his resulting mental health problems, they would have secured an expert who would attribute his destructive behavior to severe PTSD, a potentially treatable condition for

which he bears no fault, instead of psychopathy. In his petition, Nelson references his psychological evaluations from his pre-trial facility, which indicated that Nelson's PTSD symptoms were nearly twice as severe as the average among its inmates—a group already comprised of people who have on average experienced more trauma than the general population. Nelson argues that, despite counsel's awareness of these records and other "red flags" indicating severe trauma, they failed to properly investigate these leads.

In support of his argument in the district court that such investigation would have revealed material mitigating evidence that trial counsel missed, federal habeas counsel hired Dr. Bekh Bradley, a clinical psychologist, to evaluate Nelson and conduct an initial inquiry into his background. Dr. Bradley's report concluded that Nelson "suffered extreme childhood trauma and adversity, which has likely resulted in unrecognized and untreated trauma-related symptoms," and that "a failure to take into account the influence of early trauma/adversity and PTSD is likely to have led to an inappropriate assessment of [Nelson] as having antisocial personality disorder." Consistent with Dr. Bradley's recommendations, Nelson also sought additional funding under 18 U.S.C. § 3599(f) for additional experts to further evaluate the impact on Nelson of 1) childhood and adolescent trauma and 2) "life-long incarceration."

1. Procedural Hurdles

The district court found, and the State argues before this court, that Nelson raised his IATC-Mental

Health in his state habeas petition and that it was adjudicated on the merits. Nelson argues that his IATC-Mental Health claim is unexhausted, and that he can demonstrate cause for the resulting procedural default under *Martinez v. Ryan*, 566 U.S. 1, 9 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013). However, we need not and thus do not resolve whether this claim is exhausted or unexhausted, because we conclude that reasonable jurists could not debate Nelson's entitlement to relief on his IATC-Mental Health claim in either circumstance.

i. If Exhausted

If, as the district court found, this claim is the same as the ineffective assistance of trial counsel at sentencing claim that Nelson raised on state habeas, considerable deference is owed to the state court's denial of the claim. We could only grant a COA if reasonable jurists would debate whether the state court's decision "involved an unreasonable application of[] clearly established Federal law" or "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *see Ward*, 777 F.3d at 256. Additionally, if this claim was addressed by the state court on the merits, Nelson is barred under *Cullen v. Pinholster* from presenting any new evidence not before the state court to bolster this claim. 563 U.S. 170, 185 (2011) ("If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court."); *see also Escamilla*, 749 F.3d at 395 (5th Cir. 2014) ("[O]nce a claim is considered and denied on the merits by the

state habeas court," a petitioner's allegation that his state habeas counsel was ineffective for failing to provide further evidence in support "may not function as an exception to *Pinholster's* rule that bars a federal habeas court from considering evidence not presented to the state habeas court." (citations omitted)).

In his state habeas proceedings, Nelson made the conclusory allegation that his trial attorneys "failed to investigate [his] background, history, family, and friends, and, as a result, failed to discover relevant and important mitigation evidence that would have made a difference in his punishment." He referenced the double-edged nature of Dr. McGarrahan's testimony, noting that she informed the jury that he "has a number of risk factors besides ADHD including a mother working two jobs, an absent father, verbal abuse, witnessing domestic violence, and minority status," but also testified that he was "predisposed to severe aggression and violence from a very early age" and demonstrated "underlying problems with empathy and attachment." Nelson's state habeas argument concluded by declaring that Nelson "has many family members, friends[,] and former teachers that could have testified on his behalf during the punishment phase of trial but did not do so." Notably, Nelson's petition to the state court lacked any claim of severe PTSD that he now emphasizes in his federal petition.

The state habeas court, based on its review of the punishment phase testimony and affidavits prepared by Nelson's trial counsel, concluded that trial counsel "called numerous witnesses whose testimony shed light on [Nelson's] life history and allowed the jury to

decide whether the choices and lifestyles of others during [his] childhood affected [him] as an adult and whether the evidence was sufficiently mitigating to avoid a death sentence." The state court further found that Nelson "fail[ed] to identify a single undiscovered or uncalled witness . . . or to demonstrate how such witness' testimony would have benefited him." The state court noted that trial counsel made diligent efforts to contact and speak with potential mitigation witnesses, including "visit[ing] Oklahoma several times in order to speak with and locate witnesses" and "personally beg[ging] [Nelson's] mother to attend the trial[] to testify on [his] behalf."

If Nelson's IATC-Mental Health claim is the same as this IATC claim that he exhausted in state court, we conclude that no reasonable jurist would debate that the state court's denial of this claim was reasonable. *See* 28 U.S.C. § 2254(d); *see Ward*, 777 F.3d at 256.

ii. If Unexhausted

Recognizing the substantial limitations on our review of an exhausted claim, Nelson argues that his IATC-Mental Health claim is unexhausted because it is not the same as the ineffectiveness claim that he brought on state habeas. "For claims that are not adjudicated on the merits in the state court . . . we do not apply the deferential scheme laid out in § 2254(d) and instead apply a de novo standard of review." *Ward*, 777 F.3d at 256 (citations and internal quotation marks omitted). Further, *Pinholster's* bar on new evidence would not apply to an unexhausted claim. *See Pinholster*, 563 U.S. at 186 ("[N]ot all

federal habeas claims by state prisoners fall within the scope of § 2254(d) [limiting the federal court to the record that was before the state court], which applies only claims adjudicated on the merits in State court proceedings." (internal quotation marks omitted)).

If a petitioner has not exhausted the available state remedies for his claim, that claim is procedurally defaulted and a federal court ordinarily cannot consider it on habeas review. *See Coleman v. Thompson*, 501 U.S. 722, 731 (1991). However, "merits-review of a procedurally barred claim is permitted when the petitioner is able to demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law." *Segundo*, 831 F.3d at 350 (citation and internal quotation marks omitted). Nelson argues that he can demonstrate cause for his asserted procedural default of this claim under *Martinez v. Ryan* and *Trevino v. Thaler*. In these cases, the Supreme Court established that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Martinez*, 566 U.S. at 9 (so holding for jurisdictions where ineffective assistance of trial counsel claims cannot be brought on direct appeal); *see Trevino*, 569 U.S. at 428 (extending *Martinez* to jurisdictions such as Texas that "do not offer most defendants a meaningful opportunity to present a claim of ineffective assistance of trial counsel on direct appeal," even if they do not expressly prohibit it). The petitioner must demonstrate that state habeas counsel was ineffective under the standard established in *Strickland* and, further, that

the underlying ineffective assistance of trial counsel claim on which he ultimately seeks relief is "substantial." *Martinez*, 566 U.S. at 14. Here, at the COA stage, Nelson would have to show that reasonable jurists could debate that he can make such a showing for there to be "cause" under *Martinez* for the procedural default. As discussed further below, we find that Nelson cannot make this showing because reasonable jurists could not debate the substantiality of Nelson's underlying IATC-Mental Health claim.

2. Substantiality of the Claim

Reasonable jurists could not debate the substantiality of Nelson's underlying IATC-Mental Health claim. As noted, a petitioner alleging ineffective assistance of trial counsel must demonstrate that counsel's performance was deficient and that this deficiency prejudiced the defense. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (citing *Strickland v. Washington*, 466 U.S. 668, 687). When the alleged ineffective performance is a failure to investigate, we ask whether "reasonable professional judgments support the limitations on investigation." *Id*. at 528 (citing *Strickland*, 466 U.S. at 691).

In Wiggins, as here, the petitioner alleged that counsel's deficiency "stem[med] from counsel's decision to limit the scope of their investigation into potential mitigating evidence." *Wiggins*, 539 U.S. at 521. The petitioner's death penalty counsel in Wiggins relied on the pre-sentencing report and foster care records as their exclusive sources of information about their client's personal history, despite indications therein that he had suffered a traumatic

childhood worth investigating. *Id*. at 523–24. The Supreme Court noted that death penalty counsel has an "obligation to conduct a thorough investigation of the defendant's background," (citing *Williams*, 529 U.S. at 396), and held that counsel was ineffective for unreasonably limiting their investigation to these two sources that provided only a cursory understanding of the petitioner's history.

This is not a case, like *Wiggins*, in which counsel "abandoned their investigation of petitioner's background after only a rudimentary knowledge of [defendant's] history from a narrow set of sources." 539 U.S. at 524. Nor did Nelson's counsel, as in the other cases Nelson relies on, fail to "even take the first step of interviewing witnesses or requesting records," *Porter v. McCollum*, 558 U.S. 30 (2009); "fail[] to conduct an investigation that would have uncovered extensive records graphically describing [defendant's] nightmarish childhood . . . because they incorrectly thought that state law barred access to such records," *Williams*, 529 U.S. at 395; fail to review easily available prior conviction records that were informed the prosecution would rely on as aggravating evidence, *Rompilla v. Beard*, 545 U.S. 374, 387–89 (2005); fail to hire a mitigation specialist or, by their "own admission . . . conduct any mitigation investigation" *Canales v. Stephens*, 765 F.3d 551, 569 (5th Cir. 2014) (emphasis in original); or "only skim[] the records" on the defendant's background and fail to discuss the mitigation issue with the psychologist hired for guilt phase or contact witnesses who had "first[-]hand knowledge of his troubled childhood," *Walbey v. Quarterman*, 309 F. App'x 795, 796 (5th Cir.

2009).

To the contrary, Nelson's trial counsel hired a mitigation specialist who "generated a detailed Psychosocial History" for Nelson; obtained and reviewed Nelson's voluminous school, juvenile, medical, criminal, jail, and mental health records; interviewed approximately twenty of Nelson's family and friends and tried to contact others who refused to help or would not answer calls; retained a forensic psychologist to evaluate Nelson; and met with Nelson on numerous occasions to "keep him informed and afford him every opportunity to assist counsel in preparing his defense." Nelson cites no authority that indicates that his counsel's extensive and manifold mitigation investigation fell below the objective standard of reasonableness. *See Wiggins*, 539 U.S. at 533 ("*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence").

Moreover, reasonable jurists cannot debate Nelson's core complaint that counsel should have hired another psychological expert other than Dr. McGarrahan to investigate how childhood trauma shaped his destructive choices. Dr. McGarrahan, a forensic psychologist who specialized in evaluating individuals in the criminal justice system, met with Nelson twice to interview him and perform psychological testing for "approximately six to eight hours." Additionally, Dr. McGarrahan spoke with Nelson's mother and reviewed "several thousand pages of records" provided by trial counsel, including documents from the underlying capital murder offense, past criminal history, jail and juvenile

detention mental health and disciplinary records, educational records, and his medical and mental health records from early childhood. Dr. McGarrahan assessed that Nelson had "significant psychiatric issues . . . that began at a very early age . . . a history of severe ADHD, antisocial personality disorder, and some substance abuse history." She did not diagnose Nelson with PTSD or indicate that his psychological damage could be remedied so as to render him no longer dangerous.

We have consistently found that death penalty counsel is not ineffective if they rely on a medical expert's assessment of the defendant's mental functioning to inform their punishment phase strategy "instead of pushing ahead with [their] own investigation or hiring new experts who may have reached a different diagnosis." *Smith v. Cockrell*, 311 F.3d 661, 676 (5th Cir. 2002), *abrogated on other grounds by Tennard v. Dretke*, 542 U.S. 274 (2004) ("this court has refused to find that counsel violated the Strickland standard by failing to locate a different expert after the original expert concluded that the defendant was not mentally retarded"); *see Segundo*, 831 F.3d at 352 ("Given trial counsel's investigation and reliance on reasonable expert evaluations, Segundo cannot overcome the strong presumption that counsel's representation fell within the wide range of reasonable professional assistance."); *see also Fairbank v. Ayers*, 650 F.3d 1243, 1252 (9th Cir. 2011) ("[C]ounsel in this case provided the defense expert with the information necessary to form an expert opinion, and the expert did, in fact, investigate the potential defense. Later disagreement by other

experts as to the conclusions does not demonstrate a violation of *Strickland*."). The fact that habeas counsel located another expert, Dr. Bradley, who reached different and arguably more sympathetic conclusions than Dr. McGarrahan when Dr. Bradley interviewed Nelson five years later, does not render trial counsel ineffective for relying on Dr. McGarrahan's assessments.

To the extent Nelson claims that counsel was ineffective for presenting testimony from McGarrahan at all, or for generally failing to present a persuasive picture of his mental health and background, we also do not believe reasonable jurists could debate that he has failed to demonstrate a substantial claim. Once we determine that the investigation underlying a mitigating strategy was reasonable, counsels' decisions on what evidence to present and how deserve considerable deference. *See Strickland*, 466 U.S. at 690 ("strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable"); *Tenny v. Cockrell*, 420 F. Supp. 2d 617 (W.D. Tex. 2004) ("If the investigation into mitigating evidence was reasonable under prevailing professional norms, the strategy developed from the results of the investigation deserve deference."). The record demonstrates that counsel presented a detailed and significant mitigation case, aided by McGarrahan's assessment of how childhood neglect and mistreatment likely left Nelson with significant psychological damage that set him on his violent path.

Dr. McGarrahan testified that "research shows that . . . emotional unavailability or emotional neglect

of an infant is worse psychologically than physical abuse" and told the jury that she believed that Nelson was exposed to this type of harm from an early age. She emphasized that Nelson's childhood behavior indicated that he had to "cry out for help" through violence because he had important needs that "went unmet," and asserted that the degree of his psychological damage indicated that this mistreatment was severe. Specifically, McGarrahan cited a number of risk factors that she believed led to Nelson's "psychologically abnormal development," including an overworked mother, a father who was either abusive or absent throughout Nelson's life, and Nelson's exposure to violent domestic abuse. She concluded that there were "absolutely" choices made by other people in Nelson's formative years that shaped the direction of his life and that, by the time Nelson could make choices for himself, he was already "wired" to be "predisposed to severe aggression and violence" because of what he had experienced since infancy. Dr. McGarrahan's testimony tied together the descriptions of Nelson's absentee mother, abusive father, and other childhood struggles offered by his other mitigation witnesses, including Nelson's mother, brother, sister, uncle, his mother's ex-boyfriend, and a behavioral health counselor who treated him when he was young.

Nelson argues that counsel's conduct in calling Dr. McGarrahan was ineffective because she testified that Nelson had "many, many psychopathic characteristics" after informing counsel she would have to admit as much if asked. However, "a conscious and informed decision on trial tactics and

strategy cannot be the basis of constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness." *Richards v. Quarterman*, 566 F.3d 553 (5th Cir. 2009) (citations omitted)). Dr. McGarrahan admittedly made no attempt to downplay Nelson's violent and destructive tendencies, declaring for instance that "once we are at where we are now, there's certainly no cure." Nelson's trial counsel, however, strategically framed this characterization: eliciting Dr. McGarrahan's testimony that the decisions that caused Nelson to reach the "point of no return" were "essentially his mother's and his father's," not his own choices. Though this would do nothing to convince a jury to answer in Nelson's favor on the first special question, whether he would "commit criminal acts of violence that would constitute a continuing threat to society," it arguably could have worked in Nelson's favor when the jury was evaluating the third special question, whether Nelson's "character and background, and [] personal moral culpability" provided mitigating circumstances to warrant a life instead of death sentence.

Trial counsel's mitigation notes and closing argument indicate that this trade-off was indeed a conscious, strategic decision. In her pre-trail notes to counsel, Nelson's mitigation specialist wrote that "in light of current jail events . . . . [o]f course [Dr. McGarrahan] *agrees with us* that future dangerousness cannot be refuted." (emphasis added). Consistently, trial counsel stated at closing of future dangerousness:

There's certainly been enough of that for you to

> find if that's what you want to find. Okay. Our own expert pointed that out . . . as we have tried to present this case, we have not tried to hide a fact from you. I've not tried to keep something from you.

Evidently and, we believe, reasonably, Nelson's trial counsel determined that they would lose the jury's trust if they attempted to maintain that Nelson was not a present and future danger. Instead, they built a defense around presenting him as someone whom the jury should pity because he did not stand a chance of growing up differently because of childhood abuse and neglect:

> You looked over at him, I know you did, when the verdict was read and he didn't cry and showed no emotion. . . . He can't cry because crying quit doing anything for him when he was about four years old. That's why he set the bed on fire.
>
> Every decision that's ever been made for Steven Nelson has been the wrong decision. He's made a lot of them. *But the first ones, the ones that Dr. McGarrahan told you about that put him on the track for permanent derailment, those were the ones that were beyond his control*. And if that's not mitigating, there is not mitigation in a death penalty case. . . .
>
> He will never be any better. He was a train wreck waiting to happen.
>
> He didn't ask to be in that position.

We do not find it debatable that "under the

circumstances, the challenged action might be considered sound trial strategy," and accordingly find that Nelson cannot raise a substantial claim that trial counsels' decision to present Dr. McGarrahan's expert testimony as part of their mitigation strategy fell outside the bounds of professional reasonableness. *Strickland*, 466 U.S. at 689 (citations and internal quotation marks omitted).

Accordingly, Nelson's IATC-Mental Health claim is neither debatable on the merits, nor so substantial as to permit him to overcome procedural default.

3. Funding Under § 3599(f)

In addition to seeking a COA on this claim, Nelson directly appeals the district court's denial of funding under 18 U.S.C. § 3599(f) to hire both a psychiatric expert, and an expert in life-long incarceration, to further evaluate Nelson in support of this claim. As relevant here, § 3599(f) provides that capital defendants seeking habeas review are entitled to funding for "reasonably necessary" investigative and expert services. We review the district court's denial of motions for funding under this section for abuse of discretion.

While this appeal was pending, the Supreme Court decided *Ayestas v. Davis*, 138 S. Ct. 1080 (2018). In *Ayestas*, the Supreme Court determined that this circuit's requirement that petitioners demonstrate a "substantial need" for services requested under § 3599 was impermissibly more demanding than the "reasonably necessary" standard established in the statute. *Id.* at 1092. "What the statutory phrase calls for," the Supreme Court held in *Ayestas*, "is a

determination by the district court, in the exercise of its discretion, as to whether a reasonable attorney would regard the services as sufficiently important, guided by the considerations we set out more fully below." *Id*. at 1093. The Supreme Court then identified three factors that a district court must consider when evaluating whether a reasonable attorney would seek such services: "[1] the potential merits of the claims that the applicant wants to pursue, [2] the likelihood that the services will generate useful and admissible evidence, and [3] the prospect that the applicant will be able to clear any procedural hurdles standing in the way." *Id*. at 1094. Nelson requests that we vacate the district court judgment and remand for that court to apply this newly-articulated *Ayestas* standard to his requests for investigative funding for his IATC-Mental Health claim.

As we have just determined, however, Nelson has not raised a substantial claim that he can overcome the applicable procedural hurdles to this claim, nor can he demonstrate that the IATC-Mental Health claim has potential merit. No evidence Nelson could uncover with the aid of further investigative funding would affect our determination, detailed above, that counsel's investigation of these issues was reasonable based on what they knew at the time. *See Wiggins*, 539 U.S. at 523 (reasonableness of counsels' investigation is "a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time'" (citing *Strickland*, 466 U.S. at 689)). Because Nelson therefore could not demonstrate that he is entitled to funding for the

requested services to bolster his IATC-Mental Health claim, remand is unnecessary. *See Ayestas II*, 933 F.3d at 388 (remand for the district court to reconsider funding under the Supreme Court's annunciated standard in *Ayestas* not required "if the judgment is sustainable for any reason" (quoting *Af-Cap Inc. v. Rep. of Congo*, 462 F.3d 417, 425 (5th Cir. 2006))). We therefore affirm the district court's denial of funding under § 3599(f) for a psychiatric expert and an expert on life-long incarceration.

B. Failure to Adequately Investigate Holden's Death

Nelson also contends that his trial counsel were ineffective at the punishment phase because they failed to adequately investigate and present a defense to the State's punishment phase evidence that Nelson killed Jonathan Holden, another inmate at the Tarrant County Jail, while Nelson was awaiting trial. Specifically, Nelson argues that counsel insufficiently cross-examined Rick Seely, the State's eyewitness, and failed to present additional evidence that Holden was suicidal.[2]

1. Procedural Hurdles

As with Nelson's IATC-Mental Health argument, the district court found that this was simply new evidence in support of the same ineffective assistance of counsel at sentencing claim that Nelson brought on state habeas. Accordingly, it held that Nelson could not raise these new examples of counsel's alleged

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[2] Nelson did not seek funding under § 3599(f) for any facts relating to this claim.

ineffectiveness because these facts were not before the state court when it denied this claim. *See Pinholster*, 563 U.S. 170, 185. Nelson, as with the claim discussed above, contends that this is a different, unexhausted claim, and he invokes *Martinez* and *Trevino* to attempt to demonstrate cause and prejudice for the procedural default. As with his IATC-Mental Health claim, however, we find that reasonable jurists could not debate whether Nelson is entitled to relief regardless of whether this claim is exhausted or unexhausted. If exhausted, these new examples of alleged ineffectiveness are barred from consideration under *Pinholster*. If unexhausted, Nelson cannot show cause and prejudice for his failure to raise this claim in state court because no reasonable jurists could debate that this underlying ineffective assistance of counsel claim is not substantial.

2. Substantiality of the Claim

As noted, "[j]udicial scrutiny of counsel's performance must be highly deferential," and we "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. 689. On the whole, the record demonstrates that Nelson's trial counsel made substantial efforts to discredit and rebut the State's position that Nelson murdered Holden, both by cross-examining the State's key witnesses and offering their own competing expert testimony.

The State called Rick Seely, another inmate at the Tarrant County facility with Nelson, as the only eyewitness to Holden's death. Seely told the jury that Holden had angered Nelson and other inmates by

muttering the N-word under his breath. Later that morning, Nelson was released out into the common area surrounding the jail cells for his designated recreation time. According to Seely, Nelson, after jabbing at several other inmates including Holden through the bars of their cells with a broom handle, told Holden that he, Nelson, wanted Holden to get himself transferred out of the area. Nelson instructed Holden to press the button in his cell to call the guards and tell them he was going to kill himself. Seely stated that Nelson then "coaxed" Holden to stage a suicide attempt, convinced Holden to come over to the bars of his door, and wrapped a blanket around his neck. Nelson then pulled on the ends of the blanket from outside the cell for several minutes until Holden died. Seely testified that Nelson then tied the blanket to the top horizontal rail on the jail bars so that it would look like Holden had hanged himself.

In cross-examining Seely, Nelson's counsel noted a potential inconsistency in his testimony and highlighted Seely's own violent felony convictions. Additionally, trial counsel questioned Seely's motives for his testimony, probing whether he hoped for special treatment in exchange for his cooperation and openly expressing skepticism that he was providing evidence "out of the goodness of [his] heart." Though Nelson asserts that counsel failed to press other potential inconsistencies in Seely's testimony, the fact that Nelson has identified in hindsight another un-probed weakness in Seely's testimony does not render his trial counsel's cross-examination unreasonable. *See United States v. Bernard*, 762 F.3d 467, 472–73

(5th Cir. 2014) (rejecting petitioners' claim that counsel was ineffective at the punishment phase for failing to "more effectively attack[]" witnesses they "vigorously cross-examined").

The State also called Sergeant John Campos, an employee at the jail. Campos stated that he was on duty the day Holden died and found him hanging from a blanket tied to the cell door. Campos testified that the knots were unusually loose and simple compared to suicide hangings. On cross-examination, Nelson's counsel asked Campos if he knew that Holden was on suicide watch, and elicited Campos's confirmation that his initial belief on finding Holden was that he had hanged himself. The State also presented a forensic scientist who testified that Nelson could not be excluded as a contributor to the DNA mixture found under Holden's fingernails, and Dr. Lloyd White, the medical examiner who performed Holden's autopsy, who testified that he believed Holden's injuries and ultimate death resulted from "ligature strangling due to assault by another person."[3]

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[3] Nelson asserts in his brief that White's opinion was "based not on medical evidence . . . but on inadmissible hearsay statements to the sheriff's department." Indeed, White's own testimony, elicited by defense counsel on cross-examination, stated that "[t]he sheriff's department is . . . the source of the information that leads to the conclusion of homicide in this case." Defense counsel probed this potential weakness in detail, prompting White to confirm that it took him "longer than normal" to determine whether Holden's death was a suicide or a homicide and that, ultimately, the medical evidence alone did not permit White to determine whether Holden killed himself or was killed by another. Nelson claims that counsel should have sought to exclude White's conclusion that Holden's death was a homicide

Nelson contends that his trial counsel should have more thoroughly cross-examined Seely and presented additional evidence that Holden was suicidal and killed himself. We find that reasonable jurists cannot debate the sufficiency of counsels' performance in either respect. During Seely's cross-examination, Nelson's counsel noted a potential inconsistency in his testimony and highlighted Seely's own violent felony convictions. Additionally, trial counsel questioned Seely's motives for his testimony, probing whether he hoped for special treatment in exchange for his cooperation and openly expressing skepticism that he was providing evidence "out of the goodness of [his] heart. Though Nelson asserts that counsel failed to press other potential inconsistencies in Seely's testimony, the fact that Nelson has identified in hindsight another un-probed weakness in Seely's

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as "improper lay expert testimony." Nelson does not, however, attempt to demonstrate that the sheriff department's investigative reports were not materials that this expert witness was entitled to rely on in forming his opinions. *See* TEX. R. EVID. 703 ("If experts in the particular field would reasonably rely on [certain] facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.). Even if he had, reasonable jurists could not debate whether counsel provided ineffective assistance by not seeking to exclude White's statement. We will not second-guess defense counsel's potential strategic choice that getting White to admit that Holden's death was deemed a homicide "based entirely on what [White] got from the sheriff's department" and not from his examination of Holden's body was stronger evidence for Nelson's defense than if they had simply sought to exclude White's testimony. *See Johnson v. Cockrell*, 301 F.3d 234, 239 (5th Cir. 2002) ("'[W]e will not find ineffective assistance of counsel merely because we disagree with counsel's trial strategy.'" (quoting *Crane v. Johnson*, 178 F.3d 309, 312 (5th Cir.1999))).

testimony does not render his trial counsel's cross-examination unreasonable. *See United States v. Bernard*, 762 F.3d 467, 472–73 (5th Cir. 2014) (rejecting petitioner's claim that counsel was ineffective at the punishment phase for failing to "more effectively attack[]" witnesses they "vigorously cross-examined").

Trial counsel also called Dr. John Plunkett as an expert witness for the defense, an independent medical examiner who reviewed the records of Holden's death. Dr. Plunkett testified that there were no injuries to Holden's head, neck, or back to indicate he was pulled up against the jail door and forcibly strangled, calling Seely's account into question. Dr. Plunkett informed the jury that, based on Holden's position when he was found, he would have suffered cardiac arrest if he had merely "slouch[ed] down or lean[ed] forward" into the tied-off blanket for approximately five minutes or could have "simply stood up and got out of it." Ultimately, Dr. Plunkett opined that he could not definitively conclude whether Holden killed himself or was killed by another person, but could conclude with confidence that "if someone else assisted [Holden] in his death," Holden "must have been an active participant." At closing, Nelson's counsel reiterated that Dr. Plunkett's testimony "lends to the obvious story . . . [that] Holden had to have been some sort of active participant" in his death, and stated that "there's absolutely no injury on Jonathan Holden's body that would support" Seely's testimony that Nelson strangled him for four minutes or more.

Nelson asserts that counsel should also have

informed the jury that Holden had attempted suicide just weeks before his arrest and had already injured himself while incarcerated, and also should have called as a witness Charles Bailey, another inmate at the jail, who allegedly would have testified that he believed Holden's death was a suicide. "[C]omplaints of uncalled witnesses are not favored in federal habeas corpus review because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have stated are largely speculative." *Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009) (citations omitted). "To prevail . . . the petitioner must name the witness, demonstrate that the witness was available to testify and would have done so, set out the content of the witness's proposed testimony, and show that the testimony would have been favorable to a particular defense." *Id*. (citing *Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir.1985)). Here, Nelson's trial counsel did raise the fact that Holden had been on suicide watch in their cross-examination of Campos, and Nelson does not explain who else counsel should have called as a witness to present additional evidence of Holden's prior self-injury. Regarding Charles Bailey, Nelson similarly makes no showing that he was available to testify, nor does he make any proffer of what Bailey's testimony would have been. Instead, Nelson only provides the bare assertion that Bailey would have "corroborated Mr. Nelson's claim that Mr. Holden killed himself." In fact, Bailey's prior statements only intimate that Bailey once believed Holden's death resembled a suicide, and certainly do not convey that the sum total of Bailey's potential testimony would have been favorable to Nelson or

that Bailey, who specifically stated that he blocked his view from his cell because he didn't "want to be a witness to nothing," would have testified. Ultimately, reasonable jurists cannot debate that Nelson cannot raise a substantial claim that his trial counsel's methods of vigorously challenging the State's evidence that Nelson killed Holden did not "fall[] within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 688.

C. Failure to Investigate Involvement of Alleged Co-conspirators

In his final argument that his trial counsel was ineffective during the punishment phase, Nelson alleges that counsel failed to properly investigate and present potential evidence that Claude "Twist" Jefferson and Anthony "AG" Springs were involved in Dobson's murder. We refer to this as Nelson's "IATC-Participation" claim. Specifically, Nelson contends that counsel was ineffective for failing to follow-up on known weaknesses in the other men's alibis or even interview these men directly.

Though Nelson did not take the stand during the punishment phase, he testified during the guilt phase (despite his counsels' advice to the contrary) that he was not present in the church during the assaults on Dobson and Elliott. Instead, he asserted, he served as a look-out while Springs and Jefferson entered the church to rob the people inside. In anticipation of this defense, the State presented alibi witnesses for both Springs and Jefferson. These witnesses testified that Springs and Jefferson were indeed with Nelson later that afternoon when he used the victims' stolen credit cards, but testified that, when the murder was

committed earlier that day, Springs was with his girlfriend Kelsey Bursey in Venus forty-five minutes away and Jefferson was in class at the University of Texas.

At closing, the State argued that "one person cause[d] the devastation and the horror and the terror that took place in that church . . . . One person committed this act, not the other two people he wants to incriminate because he thinks he can con you all into believing something that's not true." In response, Nelson's counsel urged the jury to believe that all three men were involved, expressing doubt about Springs and Jefferson's alibis and encouraging the jury to conclude that the State's "lone actor theory doesn't make much sense."

In finding Nelson guilty of Dobson's murder, the jury did not necessarily reject Nelson's narrative that others were involved and perhaps even committed the murder. Consistent with Texas's law of parties, the jury received the following instruction:

> If you find from the evidence beyond a reasonable doubt that . . . STEVEN LEWAYNE NELSON, did then and there intentionally cause the death of an individual, CLINTON DOBSON . . . [and was] in the course of committing or attempting to commit the offense of robbery . . . then you will find the Defendant guilty of the offense of capital murder . . . -OR-
>
> If you find from the evidence beyond a reasonable doubt that the defendant, STEVEN LAWAYNE NELSON, entered into a conspiracy, if any, with CLAUDE

> JEFFERSON or ANTHONY SPRINGS . . . to commit the felony offense of robbery, and that . . . in an attempt to carry out the agreement, if any, CLAUDE JEFFERSON or ANTHONY SPRINGS . . . intentionally cause[d] the death of an individual, CLINTON DOBSON . . . and that such offense was committed in the furtherance of the robbery, and was an offense that STEVEN LEWAYNE NELSON should have anticipated as the result of carrying out of the agreement, if any, then you will find the defendant, STEVEN LEWAYNE NELSON, guilty of the offense of capital murder, though he may have had no specific intent to commit the offense of capital murder.

On the verdict form, the jury declared the Nelson was "guilty of the offense of Capital Murder" without identifying which theory it relied on. It is therefore not clear from the conviction whether the jurors had unanimously accepted the State's narrative that Nelson alone murdered Dobson and assaulted Elliot.

The extent of Nelson's role in the murder was critical at the punishment phase. Nelson could be sentenced to death only if the jury determined that he "actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken." TEX. CODE CRIM. PRO. ART. 37.071. Whether Nelson participated in a robbery in which another murdered Dobson or single-handedly murdered Dobson himself could also substantially impact the jury's answer to the two other special questions: "whether there is a

probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" and "[whether] all evidence admitted at the guilt or innocence stage and the punishment stage . . . militates for or mitigates against the imposition of the death penalty." *Id*. In closing arguments at the punishment phase, Nelson's trial counsel asked the jurors to consider whether "you, in the back of your mind, affirmatively believe that there was only one person there? Do you really think that's the case?" The State, in contrast, stated emphatically that "there wasn't anyone else there. This is the killer right here."

1. Procedural Hurdles

Like Nelson's other IATC claims, we must first examine whether his IATC-Participation claim is exhausted (as the district court held and the State argues), or unexhausted (as Nelson argues). As discussed, Nelson's state habeas counsel, John Stickels, alleged that trial counsel "failed to investigate [his] background, history, family, and friends, and, as a result, failed to discover relevant and important mitigation evidence," and declared that Nelson "has many family members, friends[,] and former teachers that could have testified on his behalf during the punishment phase of trial but did not do so." This claim, and the state court's discussion thereof, addressed whether trial counsel's investigation into Nelson's character and background was deficient. It did not touch on Nelson's allegations in this IATC-Participation claim that undiscovered evidence indicating that he played a minimal role in the capital murder itself could have been presented to

the jury.

The Supreme Court in *Pinholster* specifically noted that "we do not decide where to draw the line between new claims and claims adjudicated on the merits." 563 U.S. at 186, n.10; *see also id*. at 216, n.7 (Sotomayor, J., dissenting) ("The majority declines, however, to provide any guidance to the lower courts on how to distinguish claims adjudicated on the merits from new claims."). Our circuit has found that, while "merely putting a claim in a stronger evidentiary posture is not enough," new evidence that "fundamentally alters the legal claim" or "place[s] the claim in a 'significantly different legal posture'" can render it a new claim that was not adjudicated on the merits by the state court. *Ward*, 777 F.3d at 258, 259. We believe reasonable jurists could debate whether Nelson's IATC-Participation allegations "fundamentally alter" his IATC claim, and so constitute a different and unexhausted claim.

As he does for his other IATC claims, Nelson contends that Stickels' ineffectiveness in failing to bring this claim permits him, under *Martinez* and *Trevino*, to overcome the procedural default of this claim. The district court briefly addressed this argument, rejecting what it deemed Nelson's "conclusory allegations that Stickels' representation was deficient." In so doing, however, the district court relied in part on its finding that Stickels' alleged ineffectiveness for failing to bring Nelson's IATC-Participation claim could not be considered because Stickels in fact raised this claim when he alleged that trial counsel "failed to investigate [Nelson's] background, history, family, and friends." If Stickels

did not raise Nelson's IATC-Participation claim, the correct inquiry here is whether reasonable jurists could debate that Stickels provided ineffective assistance in failing to do so.

We conclude that they could. Counsel can be found ineffective if they failed to "raise or properly brief or argue certain issues." *Sharp v. Puckett*, 930 F.2d 450 (1991) (citing *Penson v. Ohio*, 488 U.S. 75 (1988)). As in the typical *Strickland* context, "our review is deferential, presuming that 'counsel's conduct falls within the wide range of reasonable professional assistance.'" *United States v. Williamson*, 183 F.3d 458, 462 (5th Cir. 1999) (quoting *Strickland*, 466 U.S. at 688). Counsel "need not (and should not) raise every nonfrivolous claim." *Smith v. Robbins*, 528 U.S. 259, 288 (2000) (citing *Jones v. Barnes*, 463 U.S. 745 (1983)). However, "a reasonable attorney has an obligation to research relevant facts and law, or make an informed decision that certain avenues will not prove fruitful." *Williamson*, 183 F.3d at 462 (citing *Strickland*, 466 U.S. at 688); *see also Wiggins*, 539 U.S. at 523 (counsel performs deficiently when the "investigation supporting counsel's decision not to" pursue particular strategy "was itself [un]reasonable"). "[C]ourts are 'not required to condone unreasonable decisions parading under the umbrella of strategy, or to fabricate tactical decisions on behalf of counsel when it appears on the face of the record that counsel made no strategic decision at all.'" *Richards*, 566 F.3d at 564 (quoting *Moore v. Johnson*, 194 F.3d 586, 604 (5th Cir. 1999)).

Here, reasonable jurists could debate whether Stickels was ineffective for failing to do the

investigation necessary to make an informed decision on whether to consider an IATC-Participation claim. Stickels hired a mitigation specialist to assist him, Gerald Byington, and both spent substantial time reviewing Nelson's case file and considering Nelson's trial team's mitigation investigation. However, there is no indication that they considered whether Nelson's trial team adequately investigated and presented the argument that Springs and Jefferson were involved in the crime. As Byington summarized trial counsels' mitigation strategy:

> [I]t appears there were two major themes presented by the defense. One of these themes was the presentation of medical/DNA evidence related to the death of Mr. Holden . . . The evidence presented by the defense appears to have been an effort to provide reasonable doubt that Mr. Nelson was in fact responsible for Mr. Holden's death. The second theme of the defense's punishment case appeared to focus on the numerous developmental problems and circumstances of Mr. Nelson's life.

Nowhere in his report, however, does Byington mention that trial counsel also attempted at the punishment phase to contend that Nelson was not the sole or even primary assailant. Nor did Byington or Stickels appear to evaluate the extent of trial counsels' investigation of Nelson's alleged co-conspirators that they did—or failed to do—in preparation for this argument. It is also undisputed that neither Stickels nor Byington did any independent research into Springs' or Jefferson's involvement to determine whether there was

information that trial counsel should have uncovered. Reasonable jurists could debate that Stickels failed to do the investigation necessary to make an informed decision about whether pursuing a IATC-Participation claim on state habeas could prove fruitful.

As with "a counseled appeal after conviction . . . the key is whether the failure to raise an issue worked to the prejudice of the defendant." *Sharp*, 930 F.2d at 453. In other words, Nelson can demonstrate prejudice if there is merit to his underlying IATC-Participation claim. Here, reasonable jurists could debate whether Nelson was prejudiced by Stickels' failure to bring this claim on state habeas because, as discussed below, reasonable jurists could debate the merits of this underlying claim.

2. Substantiality of the Claim

As with any other IATC claim, the underlying IATC-Participation claim (which, if viable, may allow a claim that state habeas counsel potential ineffectiveness prejudiced Nelson, thereby excusing procedural default) requires a showing of two elements: (1) deficient performance; and (2) prejudice. *Strickland*, 466 U.S. at 687.

i. Trial Counsels' Performance

Nelson contends that his trial counsel was ineffective for conducting a deficient investigation into Springs' and Jefferson's involvement to support their defense theory that Nelson was not the sole assailant. "In assessing the reasonableness of an attorney's investigation . . . a court must consider . . . whether the known evidence would lead a reasonable

attorney to investigate further." *Wiggins*, 539 U.S. at 527 (2003). Nelson emphasizes several leads that, he asserts, should have alerted competent counsel to investigate further. The State initially arrested both Springs and Nelson for the murder, after receiving information from two of the men's acquaintances connecting them both to the murder. These acquaintances told the police, as memorialized in the incident reports, that both Nelson and Springs made inappropriate and suspicious comments when a news report of Dobson's death showed on television, that Springs tried to sell them Dobson's iPhone that he had in his possession, and that Springs and Nelson would on other occasions "go out and commit robberies and burglaries together." Further, counsel was aware of images in the police file showing that Springs, unlike Nelson, had "extensive bruising and swelling on [the] knuckles of both hands" days after Dobson's murder and Elliot's beating, and had provided only a weak explanation of how he had sustained these injuries.

Finally, Nelson asserts that trial counsel knew that there were weaknesses in Springs' alibi. Kelsey Bursey, who testified that Springs was with her in Venus, Texas, before and during the murder, was his girlfriend and mother of his child, and therefore not an unbiased source. In fact, the police officer who initially interviewed her after she arrived at the station to tell them that Springs had been with her and not been in Arlington where Dobson was killed wrote in his incident report that he "believed Springs was involved in this offense and further believed [Bursey] may be attempting to cover up his behavior

by supplying him an alibi." Further, though the State presented Springs' phone records as additional evidence to demonstrate that he was in Venus when the murder was committed, the defense pointed out on cross-examination that these phone records did not provide any information about where Springs was between 10:18 p.m. the night before until 12:13 p.m. the day of the murder.

Despite counsels' awareness of these leads, Nelson notes that trial counsel never interviewed Springs. Failure to interview important potential witnesses can constitute ineffective assistance. *See, e.g.*, *Richards*, 566 F.3d at 570–71; *Bryant v. Scott*, 28 F.3d 1411, 1415 (5th Cir. 1994). Nelson adds that counsel also did not take other steps to probe the veracity of Springs' alibi or investigate the cause of the bruising on his fists.

Nelson argues that Jefferson's alibi was similarly questionable and that, despite this and Nelson's insistence that Jefferson was involved, counsel did not take even a basic step to verify it. Though Jefferson alleged that he was in Chemistry class at the University of Texas taking a test, his instructor stated that she had not administered any quiz or exam on that day. Correspondence with the school also revealed that Jefferson did not complete that semester, and stopped going to class entirely less than a month later. Jefferson's professor provided a sign-in sheet for the day in question and also stated that there was security camera footage on file with the school that would show the students as they entered the classroom.

The record shows that Nelson's trial counsel

reviewed the sign-in sheet and observed that, though there were initials written next to Jefferson's name, the handwriting looked markedly similar to the initials just below his, as if that other person had signed in for him. Despite noting this, however, trial counsel did not contact a handwriting expert, obtain other samples of Jefferson's handwriting, or otherwise seek evidence that Jefferson had not signed his own initials. Instead, the only step they took was to ask Jefferson's aunt on cross-examination if it looked from the handwriting like someone else had signed in for her nephew. She responded that it did not look like that to her. Nelson's counsel also did not obtain the security camera footage of students entering the classroom. Federal habeas counsel submitted evidence from the university's technology department that this recording would have been available if trial counsel had sought it shortly before Nelson's trial, but had been erased before Nelson's federal proceedings began. As with Springs, counsel also did not interview Jefferson, either about his uncertain alibi or the attack at the church.

The reasonableness of pretrial investigation should be considered in light of the chosen trial strategy. *Cf. Moore*, 194 F.3d at 608 ("counsel's pretrial investigation into extraneous conduct was inadequate *in light of* the chosen alibi defense" that required defendant to testify and thus open the door to the prosecution to present such evidence (emphasis added)). Here, counsels' alleged deficiencies in investigating Springs' and Jefferson's alibis and involvement were compounded by counsels' strategy: to convince the jury that these two men were involved

in the murder, but without evidence to back up the theory. As noted, counsel pointed out on Bursey's cross-examination that Springs' cell phone data could not confirm his location during the murder, but had not interviewed Springs to see if they could learn anything else connecting him to the murder or otherwise undermining Bursey's account of his actions. Counsel also attempted to cast doubt on Jefferson's alibi that he was in Chemistry class, unsuccessfully cross-examining his aunt and proposing at closing: "Could it be that, gee, a college-age kid who runs around with other knuckleheads doesn't show up for class? Is that that hard to believe?" Nelson provided an affidavit from one juror who stated that he found against Nelson in part because Nelson "tried to pin it on other people, but there was no evidence to support that," illustrating how counsels' failure to seek this evidence weakened Nelson's defense in light of their strategy.

Because Nelson's counsel sought to convince the jury that Springs and Jefferson were involved but arguably failed to take reasonable investigative steps in developing evidence in support of this argument, we believe reasonable jurists could debate that his trial counsel's performance in this regard was deficient.

ii. Prejudice from Trial Counsel's Alleged Deficiency and § 3599(f) Funding

Whether a failure to investigate prejudiced a defendant depends on what evidence a reasonable investigation would have uncovered. *Wiggins*, 539 U.S. at 534–35. Nelson acknowledges that he would have to conduct further investigation to identify what

evidence of Springs' and Jefferson's involvement trial counsel may have been able to uncover, and sought funding under § 3599(f) for this purpose. The district court denied funding after concluding, based on the evidence presented to the jury, that Nelson did indeed commit the crime alone so no evidence of another's participation would exist. Of course, Nelson seeks to conduct the requested investigation precisely to locate the evidence that he alleges exists and could have been uncovered to disprove this version of events.

Though the district court should not permit Nelson to conduct a "fishing expedition," neither should it presume that it can glean the full story based solely on the evidence before it when the petitioner's very claim is that the available evidence was lacking due to deficient investigation. *See Ayestas II*, 933 F.3d at 388 (emphasis in original) (noting that a district court may abuse its discretion by denying funding after considering only "*existing* as opposed to *potential* evidence"). In order to determine whether Nelson should receive the funding that would be necessary to develop his argument that trial counsels' alleged deficiency prejudiced him, the district court would need to properly consider his motion under the standard articulated by the Supreme Court in *Ayestas* in the first instance. *See Ayestas*, 138 S. Ct. at 1092–95 (noting district court's discretion in assessing funding requests under the "reasonably necessary" standard).

Here, however, we find ourselves in something of a Catch-22. We cannot determine whether Nelson was prejudiced without knowing what evidence could have been uncovered, and should not make this

determination based solely on the record before us when he may be entitled to investigative funding to support this claim under *Ayestas*. However, we also cannot vacate the district court's determination that this claim was procedurally barred and without merit—findings that necessarily preclude awarding funding—without first granting a COA, vesting us with jurisdiction to examine the merits of such claims. We are, finally, reticent to proceed to a thorough merits determination of this claim without the benefit of full briefing on the merits after the COA stage.

Acknowledging, then, that we lack and will continue to lack the evidence needed to assess whether Nelson was prejudiced by this deficiency, we nevertheless assess that this claim "deserve[s] encouragement to proceed further," *see Miller-El*, 537 U.S. at 327, because without further proceedings beyond the COA stage, we are unable to fully evaluate the district court's rulings that ultimately precluded funding. We are also mindful that "any doubts as to whether a COA should issue must be resolved in [the petitioner's] favor" in a death penalty case. *Ramirez v. Dretke*, 393 F.3d 691, 694 (5th Cir. 2005) (alteration in original) (internal quotation marks and citation omitted). Accordingly, we grant a COA on Nelson's IATC-Participation claim limited to the question of counsel's performance and whether the claim is procedurally barred. Depending on our resolution of these issues, we may then find it necessary to remand for the district court to apply *Ayestas* to determine whether there is a "likelihood that the services [requested] will generate useful and admissible evidence" on the prejudice prong. *See* 138 S. Ct. at

1094.

IV. *Batson* Claim

Nelson next seeks a COA on his claim that the State unconstitutionally used race to select an all-white jury, in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). The district court found, and the parties do not dispute, that Nelson properly exhausted these claims in state court on direct appeal. *Nelson*, 2015 WL 1757144, at *10–11.

Trial courts employ a three-step inquiry to assess a contemporaneous *Batson* objection:

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

Foster v. Chatman, 136 S. Ct. 1737, 1747 (2016). "[The] trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous," even setting aside the required deference we owe to the state court under AEDPA. *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008) (finding on direct appeal that the state court's rejection of defendant's *Batson* claim in that case "fail[ed] even under th[is] highly deferential standard of review"). Incorporating AEDPA deference, Nelson would have to prove that the TCCA was unreasonable when it concluded that the trial court did not clearly err in

finding that the State's provided race-neutral explanations for striking two black jurors, Martima Mays and Talmadge Spivey, were not pretext. *See Miller-El v. Dretke ("Miller-El II")*, 545 U.S. 231, 240 (2005) (citing § 2254(d)(2)).[4] At the COA stage, we consider whether reasonable jurists would debate that Nelson can make this showing.

Nelson's trial counsel objected during voir dire to the State's use of peremptory strikes to eliminate Mays, Spivey, and other minority jurors. Based on the fact that the State used a "disproportionate number of strikes"— about a third of its total number—on minority jurors, the trial court determined that Nelson made a prima facie case of racial discrimination. The State then provided race-

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[4] Nelson also contends that the state court "unreasonabl[y] appli[ed] clearly established Federal law" because it did not conduct a comparative juror analysis in evaluating his claim. § 2254(d)(1). However, our decision in *Chamberlin v. Fisher* makes it clear that a state court's failure to conduct a comparative juror analysis is not itself an unreasonable application of federal law. 885 F.3d 832 (5th Cir. 2018) (en banc). "*Miller-El II* did not clearly establish any *requirement* that a state court conduct a comparative juror analysis." *Id.* at 838 (emphasis in original). "We cannot hold that a state court which fails to conduct comparative juror analysis violates clearly established Federal law." *Id.* at 838– 39 (quoting *McDaniels v. Kirkland*, 813 F.3d 770, 783 (9th Cir. 2015) (Ikuta, J., concurring)). Though the appellant in *Chamberlin* had not, unlike Nelson, requested such an analysis on direct appeal, *Chamberlin* does not limit its holding to such circumstances. *Id.* at 838 (holding that there is no requirement to conduct such an analysis at all, "let alone" to do so *sua sponte*). We thus focus our review on the pretext analysis for striking two jurors Nelson specifically briefs in his request for a COA.

neutral rationales. As to Mays, the State articulated:

> She served on a jury that resulted in a mistrial. She also, with regard to several questions on her questionnaire[5], wrote, ["]I have not thought about it["], in regard to her feelings on the death penalty. She believed that the death penalty should never be invoked. She again writes, ["]I've not thought about it["] for two more questions dealing with the death penalty, but that she would not lose any sleep over the fact that she did not get picked. She also believed that the death penalty was not at the top of her list for possible punishment for a crime. She hesitated during questioning with regard to Question No. 2 with the parties issue.

Nelson argues in his federal habeas proceedings that these reasons were mere pretext. He notes that several white jurors also expressed discomfort with the death penalty but were not struck by the State. "If a prosecution's proffered reasons for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination." *Miller-El II*, 545 U.S. at 241. The district court considered each of Nelson's proffered comparators in turn and determined that the trial court could reasonably have found their responses on this issue materially distinguishable. From our review of the voir dire, we agree. Further, as the district court

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[5] As the Government notes in its response brief, the questionnaires themselves are not included in the record provided to this court.

noted, the State contemporaneously provided another reason for treating Mays differently: she had previously "served on a jury that resulted in a mistrial" because the jury could not reach a unanimous verdict. In fact, this was the first reason the State cited for striking her. Nelson does not state that any of the other jurors who expressed hesitation with the death penalty and were not struck had also served on hung juries in the past.

Nelson additionally contends that the State mischaracterized Mays' testimony when it claimed that she "believe[d] that the death penalty should never be invoked." Nelson points out that Mays' testimony conveyed hesitancy for the death penalty but that she affirmed that she could impose this disfavored punishment in certain cases. Nelson relies on *Foster* to argue that this "misrepresentation[] of the record" demonstrates that the State's proffered rationale was mere pretext. 136 S. Ct. at 1754. *Foster*, however, was a case where "much of the reasoning provided by [the prosecution for striking the jurors] ha[d] no grounding in fact," and "the shifting explanations, the misrepresentations of the record, and the persistent focus on race in the prosecution's file," combined with a comparative juror that further indicated pretext, all demonstrated that the prosecution was concealing racially discriminatory motives for striking jurors. *Id.* at 1749, 1754. *Foster* does not support a conclusion that the State's exaggeration of Mays's position here warrants a similar finding of discriminatory intent. Because reasonable jurists would not debate the state court's reasonableness in denying Nelson's claim that

Mays was struck on account of race, we deny a COA on this claim.

The State offered the following reasons at voir dire for striking Spivey, the second juror who Nelson discusses in his petition for a COA:

> He slept through [the judge's instructions at the initial meeting] and most of our time downstairs in the Central Jury Room. He denied arrests on his questionnaire. He actually had two, one in 1998 and one in 2010. He checked he did not want to serve on a jury because he did not believe the Defendant could get a fair trial. He also indicated he did not like jury service because he didn't want to sit around all day and that he works a lot of forced overtime, so he did not think he wanted to be on the panel. And he had problems sitting in judgment of other people.

Nelson contends on appeal that this was a mischaracterization of Spivey's testimony. Specifically, he contests the State's statement that Spivey "did not want to serve on a jury because he did not believe the Defendant could get a fair trial." Spivey's actual testimony was as follows:

> [Prosecution:] I want to refer you to something that you filled out on your questionnaire . . . . ["]Do you want to serve as a juror in this case,["] and you checked no and told us that you would give your reasons in the interview.
>
> [Spivey:] I counted the number of African-American males in the actual pool, and I

> believe it was like eight. . . . I don't believe that's a jury of a man's peers. . . . I mean, it may look bad but it might turn out to be all right. And it looked bad to me that day. I believe that man don't stand a chance.
>
> [Prosecution:] . . . do you feel like you can't give us, as the State, a fair trial?
>
> [Spivey:] I can give you a fair trial. It's just that it looked bad. It's like having a nice steak served to you on a garbage can. The steak looked good, but you don't want to eat on that garbage can.

Nelson emphasizes that "Mr. Spivey stated that *he* could be fair; he expressed only a concern with whether the *rest* of the jury would be racially representative."

As he does when discussing Mays, Nelson relies on *Foster* to argue that this mischaracterization demonstrates pretext. We find this argument similarly unpersuasive. Though the State's description of Spivey's testimony was imprecise, this does not make it unreasonable for the state court to accept the State's rationale as genuine, especially in light of the numerous other race-neutral reasons given for striking Spivey from the jury. Accordingly, we further deny a COA on Nelson's claim that Spivey was struck in violation of *Batson*.

V. Ineffective Assistance of Trial Counsel in Raising *Batson* Objection

Nelson also seeks a COA on his related claim that his trial counsel was ineffective in arguing the *Batson* objection at voir dire. Trial counsel raised *Baton*

objections in response to the State's decisions to strike five minority jurors, and argued that the disproportionate number of strikes used to remove minorities jurists from the venire demonstrated a prima facie case. The trial court agreed, and asked the State to provide its race-neutral reasons, as discussed above. Consistent with the third step of a *Batson* challenge, the district court then advised defense counsel that "I think it now becomes your burden to show purposeful discrimination." Nelson argues that his counsel was ineffective because, instead of offering comparators, pointing out the State's misrepresentations of jurors' testimony, or otherwise arguing that that these proffered reasons were mere pretext, counsel only noted that the State did not challenge three of the five for cause and then stated "I'll let the record speak for itself."

Nelson did not exhaust this claim in state court, and cannot demonstrate cause and prejudice for his failure to do so because the underlying claim is not substantial. *See Martinez*, 566 U.S. at 14. As discussed above, Nelson cannot demonstrate that the peremptory strikes in question were motivated by the jurors' race. Accordingly, Nelson cannot raise a substantial claim that he was prejudiced by his trial counsel's alleged failure to adequately argue its *Batson* objections at the third step. *See Eagle v. Linaham*, 279 F.3d 926, 943 (11th Cir. 2001) (finding that there is prejudice from counsel's failure to argue *Batson* claim when that claim "would have had a reasonable probability of success"); *see also United States v. Kimler*, 167 F.3d 889, 893 (5th Cir. 1999) ("An attorney's failure to raise a meritless argument

thus cannot form the basis of a successful ineffective assistance of counsel claim because the result of the proceeding would not have been different had the attorney raised the issue"). We deny a COA on this claim as well.

VI. Denial of Motion to Stay and Abate

Finally, Nelson appeals the district court's denial of a stay and abatement of his federal proceedings to permit him to exhaust his ineffective assistance of counsel claims and a new claim that the State presented false testimony. *See generally Rhines v. Weber*, 544 U.S. 269 (2005). The district court did not address the substance of this motion, but held simply that "[i]n light of the court's rulings in this memoranda opinion and order" in which it denied relief on all claims, "[n]o legitimate purpose would be served by granting the relief sought." Because our determination on the merits of Nelson's appeal, which we defer pending merits briefing, could affect the correctness of this ruling, we also defer consideration of the court's denial of this motion until that time.

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For these reasons, we GRANT a COA on Nelson's claim that trial counsel was ineffective for failing to investigate Springs' and Jefferson's alleged participation in Dobson's murder. We defer consideration of the denial of funding in support of this claim until our decision on the merits of Nelson's appeal. We also defer consideration of the denial of a stay to allow Nelson to exhaust the claim pending consideration of the foregoing.

With respect to all other claims, a COA is

DENIED, and the district court's denial of investigative funding in support of these claims AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

STEVEN LAWAYNE NELSON,	§	
	§	
Petitioner,	§	
	§	No. 4:16-CV-904-A
VS.	§	
	§	
LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division,	§	
	§	
	§	
	§	
	§	
Respondent.	§	

MEMORANDUM OPINION AND ORDER

Came on for consideration the amended petition[1] of Steven Lawayne Nelson ("petitioner") for a writ of habeas corpus pursuant to the authority of 28 U.S.C. § 2254. Having considered the amended petition, the response of respondent, Lorie Davis, Director, Texas Department of Criminal Justice, Correctional

[1] The original petition for writ of habeas corpus was filed October 17, 2016. Doc. 12. (The "Doc. " reference is to the number of the item on the docket in this action.) The court granted in part a joint motion for modification of the court's scheduling order to allow the filing of an amended petition. Doc. 18, as corrected by Doc. 19.

Institutions Division, the reply, the state court trial, appellate, and habeas records, and applicable authorities, the court finds that the relief sought by the petition should be denied.

I.

Background and Procedural History

Petitioner was charged by an Indictment filed May 26, 2011, with intentionally causing the death of Clinton Dobson by suffocating him with a plastic bag during the course of committing or attempting to commit the offense of robbery of, or burglary of a building of, Dobson. 1 CR[2] 12. Bill Ray ("Ray") and Steve Gordon ("Gordon") were appointed to represent petitioner at trial. 1 CR 28-29. By order signed April 13, 2011, the trial court granted petitioner's motion for appointment of mitigation specialist and appointed Mary Burdette to assist counsel in their preparation for trial. 1 CR 38. In addition, by order signed April 13, 2011, the court granted petitioner's motion to appoint an investigator and appointed Wells Investigation to assist counsel. 1 CR 39. On several occasions, the trial court approved payment of additional funds for the work of the mitigation specialist and investigator. 1 CR 201-04, 217-20; 2 CR 236-38, 367-68. And, the court granted petitioner's motions for appointment of an expert and additional funds to conduct DNA testing. 2 CR 332-38. Counsel also retained a forensic psychologist to assist at trial. 43 RR[3] 237-38; 2 CR 234 (approving interim

[2] The "___ CR ___" reference is to the volume and page of the clerk's record in the underlying state criminal case.

[3] The "___RR ___" reference is to the volume and page of the

payment).

The trial of petitioner commenced October 1, 2012. 32-RR 1, 15. On October 8, 2012, the jury returned its verdict at the guilt/innocence stage of his trial, finding petitioner guilty of the offense of capital murder, as charged in the indictment. 2 CR 401; 37 RR 32-34. The punishment phase of the trial commenced October 8, 2012. 38 RR 7. On October 16, 2012, the jury unanimously found, in response to special issues in the form prescribed by article 37.071 of the Texas Code of Criminal Procedure, (1) beyond a reasonable doubt that there was a probability that petitioner would commit criminal acts of violence that would constitute a continuing threat to society, (2) petitioner actually caused the death of Dobson or did not actually cause the death but intended to kill him or another or anticipated that a human life would be taken, and (3) that it could not find that, taking into consideration all of the evidence, including the circumstances of the offense, petitioner's character and background, and the personal moral culpability of petitioner, there was a sufficient mitigating circumstance or circumstances to warrant a sentence of life imprisonment without parole rather than a death sentence be imposed. 2 CR 417-19; 44 RR 32-33. On October 16, 2012, the trial judge signed a capital judgment imposing a death penalty on petitioner. 2 CR 424-26.

The trial court appointed David Pearson to represent petitioner on his direct appeal to the Texas Court of Criminal Appeals. 2 CR 431. By its opinion

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reporter's record in the underlying state criminal case.

delivered April 15, 2015, the Texas Court of Criminal Appeals affirmed the trial court's capital judgment imposing the death sentence on petitioner. Nelson v. State, No. AP-76,924, 2015 WL 1757144 (Tex. Crim. App. Apr. 15, 2015). Petitioner then unsuccessfully petitioned the United States Supreme Court for a writ of certiorari. Nelson v. Texas, 136 S. Ct. 357 (2015).

On October 16, 2012, the trial court appointed John Stickels ("Stickels") to represent petitioner in the filing of his state petition for writ of habeas corpus. 1 CHR[4] 127. While his direct appeal was pending, petitioner, acting through Stickels, filed his state application for writ of habeas corpus, raising seventeen grounds for relief. 1 CHR 2. Pertinent here, Stickels raised a claim of ineffectiveness of trial counsel for having failed to adequately investigate and present mitigation evidence, citing Wiggins v. Smith, 539 U.S. 510 (2003), and Lewis v. Dretke, 355 F.3d 364 (5th Cir. 2003), among other authorities. 1 CHR at 7, 49-59. The court ordered trial counsel to file affidavits to address, among other things, the contention that they had failed to thoroughly investigate petitioner's mitigation evidence and formulate a consistent and effective mitigation strategy. 1 CHR at 139. Having considered those affidavits and the State's response, the trial court adopted the State's proposed findings of fact and conclusions of law, recommending that the Texas Court of Criminal Appeals deny the relief sought. 2 CHR 352. Based on those findings and conclusions,

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[4] The "___ CHR __" reference is to the volume and page number of the cleric's habeas record in the underlying criminal case.

as well as its own review of the record, the Texas Court of Criminal Appeals denied petitioner's requested relief. Ex parte Nelson, No. WR-82,814-01, 2015 WL 6689512 (Tex. Crim. App. Oct. 14, 2015).

II.

Evidence

On appeal, the Texas Court of Criminal Appeals summarized the evidence at the guilt/innocence phase of the trial as follows:

A. Discovery of the Victims

> Members of NorthPointe Baptist Church described the events surrounding the discovery of Clint Dobson and Judy Elliot. Church member Dale Harwell had plans to meet Dobson for lunch. When Dobson did not arrive at the appointed time, Harwell tried unsuccessfully to contact him. Debra Jenkins went to NorthPointe at around 12:40, where she saw Dobson's and Elliot's cars in the parking lot. Jenkins rang the doorbell and called the church office but received no answer, so she left after about five minutes. She returned fifteen minutes later, and Elliot's car, a Galant, was no longer in the parking lot. At 1:00 p.m., another church member, Suzanne Richards arrived for a meeting with Dobson. His car was in the parking lot, but Elliot's was not. Richards waited for half of an hour, ringing the doorbell, calling, and texting Dobson.
>
> Meanwhile, Clint Dobson's wife, Laura, called Jake Turner, the part-time music minister, because she had been unable to reach her husband

by phone. Turner agreed to go to the church, and he called Judy Elliot's husband, John, who promptly drove to the church. John entered the church using his passcode and called out Dobson's name. John saw Dobson's office in disarray and saw a severely beaten woman lying on the ground. He did not immediately notice Dobson lying on the other side of the desk. John called the police.

Arlington police officer Jesse Parrish responded to the call. He noticed signs of a struggle, including blood and what appeared to be a grip plate of a pistol. Elliot was lying on her back with her hands bound behind her. John recognized his wife by her clothing. Parrish found Dobson lying face-up with his hands bound behind his back. A bloody plastic bag was covering his head and sucked into his mouth. Upon lifting the plastic bag off his head, Parrish knew that Dobson was dead.

Elliot was taken to the hospital in critical condition. She had a heart attack while there and neither the physicians nor John believed she would survive. She had traumatic injuries to her face, head, arms, legs, and back and internal bleeding in her brain. She was in the hospital for two weeks and underwent five months of therapy and rehabilitation. A permanent fixture of mesh, screws, and other metal holds her face together. At the time of trial, Elliot still had physical and mental impairments from the attack.

Doctor Nizam Peerwani, medical examiner for Tarrant County, testified that the manner of Dobson's death was homicide. Dobson's injuries indicated a violent altercation during which he

attempted to shield himself from blows from an object such as the butt of a firearm. Two wounds to his forehead appeared to be from the computer monitor stand in the office. According to Dr. Peerwani, the injuries indicated that Dobson was standing when he was first struck in the head and that he was struck in the back of his head as he fell. After he had fallen to the ground and lost consciousness, his hands were tied behind his back, and the bag was placed over his head. With-the-bag-over his head, he suffocated and died.

B [Petitioner's] Actions after the Murder

[Petitioner] texted Whitley Daniels at 1:24 p.m., and Daniels told him to bring her a cigar. After stopping at his apartment, [petitioner] drove Elliot's car to a Tire King store, where a customer bought Dobson's laptop and case out of the trunk of the Galant. At around 2:00 p.m., [petitioner] drove to a Tetco convenience store, where he used Elliot's credit card to buy gas, a drink, and a cigar. Anthony "AG" Springs' girlfriend brought AG to the Tetco. When [petitioner] tried to buy gas for her car, the card was declined. [Petitioner] and AG drove in Elliot's car to the apartment of Claude "Twist" Jefferson and Jefferson's aunt Brittany Bursey.

Daniels testified that [petitioner] and AG arrived at her house with the cigar some time after 3:00 p.m. [Petitioner] and AG soon left, but [petitioner] returned alone fifteen or twenty minutes later. [Petitioner] asked Daniels to go to the mall and use her identification with the credit cards. She declined to do so, and [petitioner] left.

[Petitioner] went to The Parks at Arlington mall. Using Elliot's credit cards at Sheikh Shoes, he purchased a t-shirt featuring the Sesame Street character Oscar the Grouch, and Air Max shoes. He also used the cards to buy costume jewelry at Jewelry Hut and Silver Gallery. [Petitioner] later returned to Sheikh Shoes with two companions, but a second attempt to use the credit card was not approved.

[Petitioner] returned to Bursey's apartment that evening with AG and Twist. [Petitioner] was wearing the shirt, jewelry, and shoes that he had bought with Elliot's cards. While taking pills and smoking, he told Bursey that he had stolen the Galant from a pastor. [Petitioner] left Bursey's apartment the next morning. The next day, [petitioner] sent a series of text messages. One asked to see the recipient because "[i]t might be the last time." Another said, "Say, I might need to come up there to stay. I did some shit the other day, Cuz." A third said, "I fucked up bad, Cuz, real bad."

Tracey Nixon, who had dated [petitioner] off and on, picked him up the day after the murder at a gas station on Brown Boulevard. [Petitioner] wore the t-shirt and some of the jewelry that he had bought with Elliot's cards. After going to a Dallas nightclub, [petitioner] spent the night with Nixon, who returned [petitioner] to Brown Boulevard the next morning.

C. Investigation and Arrest

Officers obtained an arrest warrant and arrested

[petitioner] at Nixon's apartment on March 5. At the time of his arrest, [petitioner] was wearing the tennis shoes and some of the jewelry he brought [sic] with Elliot's stolen credit cards. He was also wearing a black belt with metal studs. The shoes, belt, phone, and jewelry were seized during [petitioner's] jail book-in.

Officers seized other items from [petitioner's] apartment pursuant to a search warrant. They recovered a pair of black and green Nike Air Jordan tennis shoes that appeared to match a bloody shoe print at NorthPointe, the New Orleans Saints jersey seen on the mall surveillance videos, a gold chain necklace, a pair of men's silver earrings with diamond-like stones, a Nike Air Max shoe box, a Sheikh Shoes shopping bag, a Sesame Street price tag, a Jimmy Jazz business card, and receipts dated March 3 from several of the stores. Officers found Dobson's identification cards, insurance cards, and credit cards in Elliot's car.

DNA from Dobson and from Elliot was discovered in a stain on [petitioner's] shoe. [Petitioner's] fingerprints were lifted from the wrist rest on Dobson's desk, from receipts, and from some of the items from the mall.

A trace-evidence analyst detected similarities between [petitioner's] shoe and a bloody shoe print on an envelope in Dobson's office. [Petitioner's] belt appeared to be missing studs, and similar studs were recovered from the office. According to a firearms expert, the plastic grip found in Dobson's office came from a 15XT Daisy air gun, which is a CO2-charged semiautomatic BB gun

modeled on a Colt firearm. The jury saw a BB gun manufactured from the same master mold and heard from a text message read into the record that [petitioner] was seeking to buy a gun just days before the killing.

D. Defense Testimony

[Petitioner] testified on his own behalf. According to him, from about 11:30 p.m. on March 2, until 6:00 or 7:00 a.m. on March 3, he and three companions were looking for people to rob. They had firearms. [Petitioner] went home for a while in the morning but later joined up with AG and Twist. [Petitioner] claimed that he waited outside the church while AG and Twist went in. Twentyfive minutes later, he went inside and saw the victims on the ground. They were bleeding from the backs of their heads, but they were still alive. [Petitioner] then took the laptop and case. According to [petitioner], AG gave him keys and credit cards. [Petitioner] waited in Elliot's car for a while and then returned to Dobson's office. By that time, the man was dead. [Petitioner] could not stand the smell, so he returned to Elliot's car. He drove the group to his apartment, retrieved a CD and his New Orleans Saints jersey, and continued to Bursey's apartment, where they smoked marijuana. [Petitioner] then left Bursey's apartment in Elliot's car.

[Petitioner] testified that he knew people were inside the church and that he agreed to rob them. He claimed that he did not intend to hurt anyone and had no part in what happened inside of the church. He also acknowledged making the

> purchases at Tetco and buying items at the mall.
>
> [Petitioner] testified to having several prior convictions.

Nelson, 2015 WL 1757144, at *1-3.

With regard to the punishment phase of the trial, the Court of Criminal Appeals summarized the evidence as follows:

> [Petitioner] began getting into trouble with Oklahoma juvenile authorities when he was six years old. His juvenile career included property crimes, burglaries, and thefts. Despite efforts by Oklahoma authorities to place him in counseling and on probation, [petitioner] was incarcerated in that state at a young age because he continued to commit felonies. According to Ronnie Meeks, an Oklahoma Juvenile Affairs employee who worked with [petitioner], this was "quite alarming."
>
> [Petitioner] was sent to a detention center in Oklahoma for high-risk juveniles. On one occasion, while Meeks was driving [petitioner] to the facility for diagnostic services, [petitioner] fled from Meeks' pickup truck. He was apprehended a few minutes later. At the facility, [petitioner] was disruptive and tried to escape. After a few weeks, [petitioner] was sent to a group home in Norman, Oklahoma, for counseling. There, [petitioner] did not fare well. He was disruptive and did not try to make any improvements.
>
> When Meeks needed cooperation from [petitioner's] mother, she was available. [Petitioner] never appeared to Meeks to be in need

of anything; his mother appeared to be providing enough.

Meeks testified that, in addition to being uncooperative with the efforts in Oklahoma to provide services and to rehabilitate [petitioner], [petitioner] never exhibited any remorse about any of his actions.

. . .

[Petitioner] was also involved in the Texas juvenile justice system through the Tarrant County probation office. Mary Kelleher, of that office, first had contact with [petitioner] in April 2000, when he was thirteen years old. The police referred [petitioner] to her for having committed aggravated assault with a deadly weapon. Kelleher worked with [petitioner] during a time when he was pulling fire alarms, was truant, and was declining in school performance. In December 2001, the police department again referred [petitioner] to Kelleher for multiple charges, including burglaries of a habitation, criminal trespass of a habitation, and unauthorized use of a motor vehicle. After the department was notified that [petitioner] was a runaway, the juvenile court detained him until all of the charges were disposed.

The Tarrant County juvenile court adjudicated [petitioner], then fourteen years old, for burglary of a habitation and unauthorized use of a motor vehicle. He was committed to the Texas Youth Commission ("TYC") for an indeterminate period. According to Kelleher, it is unusual for a juvenile

to be committed to TYC for property crimes at that age, but [petitioner's] history made him a rare case.

Kelleher testified that [petitioner] had family support from his mother but none from his father. [Petitioner's] mother was neither abusive nor neglectful. According to [petitioner's] mother, his two siblings went to college and did not get into trouble. [Petitioner] indicated to Kelleher that he knew his actions were wrong, but he acted out of impulse and boredom, without an exact reason.

[Petitioner] was a "chronic serious offender." While in TYC, [petitioner] had four of the highest-level disciplinary hearings and was repeatedly placed in the behavior-management plan. [Petitioner] was originally sent to TYC for nine months, but he spent over three and a half years confined because of his infractions. This sentence for a burglary adjudication was an extraordinarily lengthy time to spend in TYC. He eventually made parole, had his parole revoked, and returned to TYC.

[Petitioner] was paroled from TYC a second time. On his second parole, when [petitioner] was twenty years old, he again did not comply with the terms, even after counseling. His parole officer issued a directive to apprehend [petitioner] for these violations, but he "aged out" of the juvenile system before he could be picked up, allowing him to remain unapprehended.

. . .

In 2005, [petitioner], then eighteen years old, was

stopped while driving a stolen car. The officer who arrested him concluded that [petitioner] was "a compulsive liar."

Video evidence and testimony from November 30, 2007, showed [petitioner] in a Wal-Mart stock room posing as an associate from a different store. [Petitioner] put a laptop computer down his pants and then walked to the exit. The following week, [petitioner] was apprehended at a separate Arlington Wal-Mart for putting on new boots off the shelf and leaving the store without paying.

After being released from state jail in 2010, [petitioner] assaulted his live-in girlfriend, Sarina Daniels. When Sarina ran outside after an argument, [petitioner] caught her and dragged her inside. When she tried to call 9-1-1, he broke her telephone. [Petitioner] bound Sarina with duct tape and tried to have her stand on a trash bag so her blood would not get on the carpet. He held a knife to her throat while holding her by the hair and made her apologize for talking to another man while [petitioner] was incarcerated. [Petitioner] pulled the knife away and told Sarina that he was not going to kill her. He then grabbed her by the throat, pushed her onto a dresser, and said, "But if you do it again, then I will." [Petitioner] then choked Sarina. Sarina filed charges, and [petitioner] was arrested.

For this aggravated assault with a deadly weapon, [petitioner] was placed on probation and sent to a ninety-day program at the Intermediate Sanctions Facility ("ISF") in Burnet. Sherry Price, a Dallas County probation officer, told [petitioner] to report

as soon as he was released from the program, which [petitioner] failed to do. After [petitioner] failed to report as directed, Price told him to report to her on March 3. He did not report, and hours later, he killed Clint Dobson.

. . .

[Petitioner] was classified as an assaultive inmate in the Tarrant County Jail while awaiting trial. For a time, he was in restrictive housing, but he nevertheless committed numerous serious disciplinary infractions. Among other things, [petitioner] broke a telephone in the visitation booth and then threatened the responding officer. After one altercation with a guard, it took three officers to subdue [petitioner]. One officer's foot was fractured. In another incident, [petitioner] refused to return to his cell. Three officers tried to escort him to his cell, but [petitioner] stood in his cell door to prevent it shutting. When officer Kent Williams reached in to slide the door shut, [petitioner] grabbed him, struck him in the face, pulled him into his cell, and threw him on the desk and into a wall.

[Petitioner] was also combative with other inmates and, on at least one occasion, was complicit in arranging for a bag filled with feces and urine to be placed in another inmate's cell. After [petitioner] was assigned to a tank for problematic inmates, he broke the lights in his cell.

On February 22, 2012, [petitioner] broke multiple fire-sprinkler heads and flooded the day room.

The jury saw photographs and video of this, including [petitioner] dancing in the water. Six officers restrained him. Breaking the sprinkler heads triggered the fire alarm in the whole jail.

. . .

On March 19, 2012, while [petitioner] was in the Tarrant County jail awaiting trial in this case, he killed Jonathon Holden, a mentally challenged inmate. According to a fellow inmate who witnessed the incident, Holden had angered inmates when he mentioned "the N word under his voice." [Petitioner] was in the day room of the holding area, and he talked Holden into faking a suicide attempt to cause Holden to be moved to a different part of the jail. Holden came to the cell bars, and [petitioner] looped a blanket around Holden's neck. [Petitioner] tightened the blanket by bracing his feet on the bars and pulling with both hands on the blanket. Holden's back was against the bars and he was being pulled up almost off his feet. It took four minutes for Holden to die. Afterwards, [petitioner] did a "celebration dance" in the style of Chuck Berry, "where he hops on one foot and plays the guitar." [Petitioner] used a broom stick, which he had previously used to poke another mentally challenged inmate in the eye, as a guitar.

. . .

Following Holden's death, [petitioner] was assigned to a single-man, self-contained cell for dangerous and violent inmates. On April 22, 2012, officers found contraband, such as a broom handle

and extra rolls of toilet tissue, in [petitioner's] cell. In May 2012, a search of [petitioner's] cell yielded a bag of prescription drugs.

On July 20, 2012, a few weeks before trial, [petitioner] damaged jail property in a two-hourlong incident, of which the jury saw security footage and heard testimony. While in a segregation cell, [petitioner] blocked the window with wet toilet paper. He then flooded his cell. Ultimately, the officers had to use pepper spray to subdue [petitioner]. Officers in protective gear restrained [petitioner] and took him to the decontamination shower. During this time, [petitioner] rapped and sang. While his own cell was decontaminated, [petitioner] flooded the toilet in the holdover cell. He brandished a shank made from a plastic spoon. When he was being returned to his cell, [petitioner] fought and threatened the officers. They ultimately placed him in a restraint chair, a process that took eight officers. This disturbance took about seventy percent of the jail's manpower. Sergeant Kevin Chambliss, who testified about the incident, had to request back-up personnel from another facility.

On August 23, 2012, on a day of voir dire proceedings, [petitioner] cracked one of the jail's windows and chipped off paint with his belly chain while in the jail gym. He showed no remorse. [Petitioner's] dangerous activity continued after the guilt phase of trial. After the jury's verdict was read, while [petitioner] was in a holdover cell, he ripped the stun cuff off of his leg. Again, he showed no remorse. During trial, while

[petitioner] was being escorted from the jail to the courtroom, he tried to move his cuffs from behind his back multiple times. During the punishment phase, officers found three razor blades inside letters addressed to [petitioner], along with other contraband items.

. . .

[Petitioner's] prior convictions comprised failure to identify, unauthorized use of a motor vehicle, burglary of a building, and numerous thefts.

. . .

The defense put on a forensic psychologist, Doctor Antoinette McGarrahan. She testified that, although [petitioner] had no current learning disability or cognitive impairment, he had a past history of learning disabilities. Dr. McGarrahan explained that, when, as a three-year old, [petitioner] set fire to his mother's bed with intent to cause harm, it was essentially a cry for attention and security. She believed that there was "something significantly wrong with [petitioner's] brain being wired in a different way, being predisposed to this severe aggressive and violence from a very early age." She testified that, by the time [petitioner] was six years old, he had had at least three EEGs, meaning that people were already "looking to the brain for an explanation" of his behavior. The test results did not indicate a seizure disorder, but Dr. McGarrahan said that they did not rule out [petitioner] having one. Risk factors present in [petitioner's] life included having ADHD, a mother who worked two jobs, an

> absent father, verbal abuse, and witnessing domestic violence.
>
> [Petitioner] spoke about two alter egos, "Tank" and "Rico." Dr. McGarrahan did not believe that [petitioner] had a dissociative-identity disorder; rather, these alter egos were a way to avoid taking responsibility for his actions.
>
> Dr. McGarrahan acknowledged on cross-examination that [petitioner] likes violence and has a thrill for violence and that it is emotionally pleasing to him. She said he is "criminally versatile," and she agreed that characteristics of antisocial personality disorder describe him. According to her, people with antisocial personality disorder have trouble following the rules of society and repeatedly engage in behavior that is grounds for arrest. They are consistently and persistently irresponsible and impulsive; they tend to lie, steal, and cheat. [Petitioner] has many characteristics of a psychopath - -including a grandiose sense of self, a lack of empathy, and a failure to take responsibility. Generally, such a person prefers to lie, cheat, and steal to get by.

Nelson, 2015 WL 1757144, at *4-8.

III.

Claims for Relief

Petitioner asserts five grounds for relief, each with multiple sub-parts. The grounds are stated as follows:

I. MR. NELSON WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL IN

VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS WHEN DEFENSE COUNSEL FAILED TO ADEQUATELY INVESTIGATE, PREPARE, AND LITIGATE SENTENCING

II. DEFENSE COUNSEL'S FAILURE TO OBJECT TO VIOLATIONS OF MR. NELSON'S FAIR TRIAL RIGHTS AND OTHERWISE SECURE A FAIR TRIAL ENVIRONMENT CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS

III. MR. NELSON'S CONVICTION AND SENTENCE VIOLATE THE FOURTEENTH AMENDMENT BECAUSE THE PROSECUTION USED RACE TO SELECT THE JURY

IV. DEFENSE COUNSEL'S FAILURE TO LITIGATE THE THIRD STEP OF THE *BATSON* CLAIM CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS

V. MR. NELSON WAS DEPRIVED OF DUE PROCESS, IN VIOLATION OF *NAPUE V. ILLINOIS* AND *GIGLIO V. UNITED STATES*, WHEN THE STATE KNOWINGLY PRESENTED FALSE TESTIMONY DURING THE SENTENCING PHASE

Doc. 25 at i-iii

IV.

Applicable Legal Standards

A. General Standards

In pertinent part, 28 U.S.C. § 2254 provides that the only ground for relief thereunder is that the petitioner "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). A petition brought under § 2254

> shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A decision is contrary to clearly established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court of the United States on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. Williams v. Taylor, 529 U.S. 362, 405-06 (2000); see also Hill v. Johnson, 210 F.3d 481, 485 (5th Cir. 2000). A state

court decision will be an unreasonable application of clearly established federal law if it correctly identifies the applicable rule but applies it unreasonably to the facts of the case. Williams, 529 U.S. at 407-08.

> In a § 2254 proceeding such as this, "a determination of a factual issue made by a State court shall be presumed to be correct" and the petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). A federal court may assume the state court applied correct standards of federal law to the facts, unless there is evidence that an incorrect standard was applied. Townsend v. Sain, 372 U.S. 293, 315 (1963)[5]; Catalan v. Cockrell, 315 F.3d 491, 493 n.3 (5th Cir. 2002).

B. Ineffective Assistance of Counsel

To prevail on an ineffective assistance of counsel claim, petitioner must show that (1) counsel's performance fell below an objective standard of reasonableness, i.e., that his counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed to petitioner by the Sixth Amendment, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. Strickland v. Washington, 466 U.S. 668, 687 (1984). "[A] court need not determine whether counsel's performance was deficient before examining the

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[5] The standards of Townsend v. Sain have been incorporated into 28 U.S.C. § 2254(d). Harris v. Oliver, 645 F.2d 327, 330 n.2 (5th Cir. Unit B May 1981).

prejudice suffered by the defendant as a result of the alleged deficiencies." Id. at 697; see also United States v. Stewart, 207 F.3d 750, 751 (5th Cir. 2000). "The likelihood of a different result must be substantial, not just conceivable," Harrington v. Richter, 562 U.S. 86, 112 (2011), and petitioner must prove that counsel's errors "*so undermined* the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (quoting Strickland, 466 U.S. at 686). Judicial scrutiny of this type of claim must be highly deferential and the petitioner must overcome a strong presumption that his counsel's conduct falls within the wide range of reasonable professional assistance. Strickland, 466 U.S. at 689. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. Simply making conclusory allegations of deficient performance and prejudice is not sufficient to meet the Strickland test. Miller v. Johnson, 200 F.3d 274, 282 (5th Cir. 2000). It is not enough to show that some, or even most, defense lawyers would have handled the case differently. Green v. Lynaugh, 868 F.2d 176, 178 (5th Cir. 1989).

Where a petitioner's ineffective assistance claims have been reviewed on their merits and denied by the state courts, federal habeas relief will be granted only if the state courts' decision was contrary to or involved an unreasonable application of the standards set forth

in Strickland. See Bell v. Cone, 535 U.S. 685, 698-99 (2002); Santellan v. Cockrell, 271 F.3d 190, 198 (5th Cir. 2001).

V.

Analysis

A. Assistance of Counsel at Sentencing

In his first ground, petitioner contends that he did not receive effective assistance of counsel because his counsel failed to adequately investigate, prepare, and litigate sentencing. Specifically, he says his counsel failed to present evidence (1) of petitioner's diminished role in the crime, (2) that Holden's death was a suicide, and (3) of petitioner's background and mental health. At the end of a lengthy recitation of "evidence" that was not presented and is not in the state records, petitioner makes the conclusory allegation that this ground is procedurally defaulted but excused under Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309 (2012), and Trevino v. Thaler, 133 S. Ct. 1911 (2013), because his habeas counsel, Stickels, "failed to raise this substantial IAC claim." Doc. 25 at 66. That is, "Stickels failed to investigate anything; reprinted irrelevant portions of appellate briefing from other clients' cases, and generally failed to litigate with the standard of care expected of state post-conviction counsel in capital cases." Id.

Martinez and Trevino hold that a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance of counsel at trial if the petitioner had no counsel in the state habeas proceeding or his state habeas counsel was ineffective. Trevino, 133 S. Ct. at 1921.

Thus, the issue is whether Stickels provided ineffective assistance at the habeas stage of the proceedings.

Where alleged prejudice arises from the deficiency of habeas counsel in failing to point out the deficiency of trial counsel, the petitioner must demonstrate the constitutional inadequacy of both his habeas and trial counsel. Sells v. Stephens, 536 F. App'x 483, 492 (5th Cir. 2013). That is, petitioner must show that both his trial and habeas counsels' representation fell below an objective standard of reasonableness. Id. at 493 (quoting Strickland, 466 U.S. at 688). And, petitioner must show that there is a reasonable probability that, absent the errors, the jury would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. Id. (quoting Strickland, 466 U.S. at 695).

In an attempt to meet his burden, as stated, petitioner offers nothing but conclusory allegations that Stickels' representation was deficient. That Stickels may have copied portions of the state habeas petition from other work he had done does not establish that his representation of petitioner in regard to the first ground of the state habeas petition, urging ineffective assistance of trial counsel, fell below an objectively reasonable standard. See Sells, 536 F. App'x at 494¬95 (length of brief and number of claims asserted in no way establish unreasonableness). That the facts alleged were not as specific as they might have been did not prevent the trial court from considering whether trial counsel's performance fell below an objectively reasonable standard in investigating and presenting mitigation

evidence. The trial court did perform that analysis and determined that Ray and Gordon provided effective assistance to petitioner. 2 CHR 300-37, 352; Ex parte Nelson, 2015 WL 6689512.

Petitioner now wishes to expand upon his claim of ineffective assistance of trial counsel to include numerous other supposed lapses by them. But, having already asserted that claim, he does not now get another bite at the apple. Clearly, Martinez, as made applicable here through Trevino, applies only where the issue of ineffective assistance of trial counsel was not raised in the state court because the petitioner did not have counsel or his habeas counsel failed to raise the issue. Martinez, 566 U.S. at 5 ("petitioner's postconviction counsel did not raise the ineffective-assistance claim in the first collateral proceeding, and, indeed, filed a statement that, after reviewing the case, she found no meritorious claims helpful to petitioner"), 16 (referring to the "limited circumstances" to which the case applies). The Fifth Circuit agrees. Escamilla v. Stephens, 749 F.3d 380, 394-95 (5th Cir. 2014) ("once a claim is considered and denied on the merits by the state habeas court, Martinez is inapplicable, and may not function as an exception to Pinholster's rule that bars a federal habeas court from considering evidence not presented to the state habeas court"). See Clark v. Davis, No. 14-70034, 2017 WL 955257, at * 9 (5th Cir. Mar. 10, 2017)(discussing new mitigation evidence and noting that the court need not decide whether petitioner presented a new claim because, to the extent he did, "any such claim would be time-barred under 28 U.S.C. § 2244(d)").

Petitioner argues that the new evidence he presents fundamentally alters the ineffective assistance claim such that this court should consider matters that were not before the state courts. The court does not agree. Clearly, the claim presented by state habeas counsel was ineffective assistance of trial counsel with regard to mitigation evidence. Petitioner wants the court to consider additional evidence in support of that claim. Merely putting a claim in a stronger evidentiary posture does not make it a new claim. Escamilla, 749 F.3d at 395. Nor can petitioner obtain de novo review of claim that has been exhausted by piling on extraneous matters and alleging that he is presenting a new claim under Martinez. Allowing such would completely undermine the purpose of habeas review.

Even if petitioner's conclusory allegations were sufficient to entitle him to review of the "new" ineffective assistance of counsel claim he now purports to assert, he could not prevail. Petitioner's own evidence regarding the work of his habeas attorney belies the contention that Stickels failed to properly investigate and raise the alleged ineffective assistance of trial counsel. See, e.g., Doc. 26 at 32 (Stickels obtained appointment of a mitigation investigator), 213-18 (mitigation investigator notes that mitigation specialist at trial was experienced and well-qualified, procurement of records and interviews of witnesses were exhaustive, and defense strategy was to provide reasonable doubt that petitioner killed Holden and to focus on numerous developmental problems and circumstances of petitioner), 206 (mitigation investigator reviewed files and consulted

with experts), 207-12 (Stickels conferred with trial court mitigation specialist, trial counsel, and mitigation investigator, as well as reviewed files and visited petitioner four times). As stated, petitioner's habeas counsel, Stickels, raised the issue of ineffectiveness of trial counsel in failing to investigate and present mitigating evidence. 1 CHR 3, 49-58. The trial court ordered trial counsel to submit affidavits to address the alleged deficiencies, 1 CHR 139-41, which they did. 1 CHR 142-66. The trial court made extensive findings of fact and conclusions of law with regard to the alleged ineffective assistance claim. 2 CHR 301-15. In particular, the trial court found that Ray and Gordon complied with prevailing professional norms, including ABA Guidelines, in conducting a thorough mitigation investigation and presenting the best mitigation case they could in light of the witnesses and evidence available to them. Id. Petitioner has not shown that the state courts' analysis of this claim was contrary to, or an unreasonable application of, the standards of Strickland. Harrington v. Richter, 562 U.S. 86, 100-01 (2011).

Petitioner now attacks the manner in which trial counsel chose to proceed. The record reflects that Ray and Gordon fully investigated petitioner's background and sought out mitigation witnesses. They cannot be faulted because petitioner himself, family members, and others were not forthcoming or did not want to cooperate or even misled them. Moreover, they were entitled to rely on the reasonable evaluations and opinions of the expert they hired.[6]

[6] Petitioner does not argue that the expert who testified at trial

Segundo v. Davis, 831 F.3d 345, 352 (5th Cir. 2016); Turner v. Epps, 412 F. App'x 696, 704 (5th Cir. 2011). It is not the duty of federal courts to examine the relative qualifications of experts hired and experts that might have been hired. Hinton v. Alabama, 134 S. Ct. 1081, 1089 (2014).

Finally, there is no reason to believe, and petitioner has not established, that even had trial counsel done all of the things petitioner alleges should have been done, there is a substantial likelihood that the result of the proceedings would have been different. Petitioner ignores the fact that he was the only perpetrator to be directly linked to the scene of the murder. DNA from Dobson and Elliot was found on petitioner's shoes[7]; petitioner's fingerprints were found on a wrist rest on Dobson's desk; petitioner's shoe print was found in Dobson's office; studs found in Dobson's office[8] matched a studded belt petitioner was wearing when he was arrested. Shortly after the murder of Dobson, petitioner drove Elliot's car to a Tire King where he sold Dobson's laptop and attempted to sell Dobson's iPhone 9.[9] Petitioner used

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was not competent or qualified to evaluate him. Rather, his complaint is that his trial counsel failed to direct the expert so that her testimony was more favorable to him.

[7] Blood was found on the tops of the shoes, not merely the soles, undermining petitioner's contention that he merely happened upon the scene after the horrific beatings had already taken place.

[8] Actually, one of the studs was found on Dobson's left leg. 32 RR 186.

[9] 933 RR 94.

Elliot's credit cards to buy gas, a drink and a cigar. He met Springs at the gas station. Springs and Jefferson were at the Parks Mall with petitioner where petitioner used Elliot's credit cards to buy jewelry, a t-shirt, and shoes. Nelson, 2015 WL 1757144, at *2-3.

Dobson was the pastor of NorthPointe Baptist Church, where Elliot was his secretary. The murder took place in the pastor's office and the scene was horrific. Dobson and Elliot had each been beaten, their hands tied behind their backs, and were lying face up on the floor. Elliot's husband did not recognize her, she had been beaten so badly. The medical examiner said that Dobson had first been struck in the head while he was standing and struck again as he fell. After he had fallen to the ground and lost consciousness, he was bound, and a plastic bag placed over his head. With the bag over his head, Dobson suffocated and died. Elliot was taken to the hospital in critical condition and suffered a heart attack while there. She had traumatic injuries to her face, head, arms, legs, and back, and internal bleeding in her brain. She was in the hospital for two weeks and underwent five weeks of therapy and rehabilitation. A permanent fixture of mesh, screws, and other metal holds her face together. At the time of trial, she still had physical and mental impairments from the attack. Id. at *1-2.

In addition to the evidence recited by the Texas Court of Criminal Appeals with regard to the sentencing phase of the trial, supra, the court notes the following: During his time in Oklahoma, petitioner never exhibited any remorse for what he

had done. 39 RR 14. Mid-career, when he was thirteen or fourteen, petitioner admitted to a probation officer that he knew his actions were wrong, but he acted out of impulse and boredom, without an exact reason. 38 RR 14. While participating in a cognitive treatment program as an adult, petitioner identified his three main thinking errors as "power thrust, uniqueness, and criminal addictive excitement." 41 RR 18. These terms were defined as follows:

> Q. So what is power thrust? When do we use that?
> A. Power thrust is someone that wants to be in control, someone that's a leader, someone that uses anger, manipulation, threats to--to gain that power. If you lose that power, you're going to do anything that you can to regain that power regardless of the consequences. It's kind of like, you know, if you do something to me, I'm going to do something back.
> Q. And you mentioned also the criminally addictive behavior?
> A. Criminally addictive excitement is someone that likes to have fun and excitement. It's--they get respect for their irresponsible and reckless behavior. It's someone that's like a sprinter, not a, you know, a long distance runner. Someone that's easily led into criminal activity unless you're the leader yourself, an instant gratification type.
> Q. And you also mentioned uniqueness?
> A. Uniqueness is you think you're better than everybody else. You think you're special, you

> think you're different. You think the rules don't apply to you. And you always want to stay on the top, start at the top.

41 RR 18-19.

Petitioner alleges that his trial counsel were ineffective in failing to investigate and establish his diminished role in the murder.[10] However, petitioner's own testimony established his guilt as a party to the crime. The matters that petitioner says his counsel should have raised are but red herrings and the jury would have seen them as such.

There was no DNA evidence or other evidence linking Springs to the murder.[11] The mother of Springs' child and one of her friends each testified that Springs was with them in Venus, Texas, the night before the murder until they met petitioner at the gas station after the murder. Cell phone records showed that Springs' phone had been used in Venus numerous times during that period and that the phone began to travel at 1:23 p.m. on the day of the murder. The phone was quiet for a number of hours, but that is consistent with testimony that Springs was sleeping. The phone records did not confirm petitioner's allegation that Springs had been with him the night before the murder and had used the phone

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[10] Petitioner overlooks the cross-examination by his attorneys that raised questions about Springs knowledge of events at the church. See, e.g., 35 RR 136-38.

[11] Springs voluntarily gave a DNA sample to police. 34 RR 153. None of his fingerprints were found inside the church. 34 RR 253-54.

at another location.[12] A number of Springs' fingerprints were found in and on Elliot's car and Springs had her car keys and Dobson's iPhone. 34 RR 163-64, 166-67. After police obtained his phone records, Springs was cleared of the capital murder offense. 34 RR 181.

Petitioner says his counsel should have presented evidence that Springs had bruising on his arms four days after the murder. The evidence to which he refers is not part of the state court record and is not properly authenticated, even assuming the court could consider it. The court further notes that the same police report upon which he relies contains a number of false statements made during the course of the investigation, including petitioner's own statements, which contradict his testimony at trial. Doc. 26 at 297-325.

Petitioner next says that his counsel should have learned from Tracey Nixon that she overheard telephone conversations between petitioner and Springs implicating Springs in the murder. Of course, petitioner was a party to the calls and could have told his counsel about them. And, Nixon could have told petitioner's counsel about the calls when she spoke with him the week before trial. 34 RR 64. Clearly, Nixon's testimony at trial was designed to help petitioner, 34 RR 67 (petitioner would not have worn the studded belt), so there would have been no reason to withhold any favorable information.

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[12] Given the number of calls made on Springs' phone, petitioner's suggestion that Springs was out all night with petitioner and never used the phone is implausible.

Petitioner next says that his counsel failed to adequately present evidence that Springs was in possession of valuable property of the victims. That Springs ultimately wound up with Dobson's iPhone and Elliot's keys is inconsequential. Video and testimony at trial established that petitioner drove Elliot's car to a Tire King almost immediately after the murder where he sold Dobson's laptop and attempted to sell the iPhone. Even if the evidence had any meaning, petitioner has not shown that he had witnesses willing and able to testify competently to these facts.

Petitioner says that his counsel failed to investigate and prepare to address the testimony of the alibi witnesses for Springs or even interview Springs, who was not indicted "for reasons still unknown." Doc. 25 at 24. Of course, the testimony at trial was that Springs was cleared by his telephone records. 34 RR 181. But, in any event, petitioner does not have any evidence to support these contentions. And, the court notes that the witnesses petitioner says should have been called to testify, Cotter and Cobb, are apparently the ones who first advised police that petitioner was involved in the murder.

Further, with regard to petitioner's involvement in the murder, petitioner says his counsel failed to adequately investigate Jefferson's substantial involvement in the crime. Again, there is no evidence to support this contention. It appears that petitioner may not have decided until he testified at trial to implicate Jefferson. One of petitioner's own exhibits reflects that petitioner only identified Springs and himself as having been involved. Doc. 26 at 312-13.

Petitioner next addresses the testimony regarding Holden's death, arguing that his counsel should have established that it was a suicide. In particular, he says his attorneys should have done a better job of cross-examining inmate Seely, who testified that he saw petitioner kill Holden, and of establishing that Holden was suicidal. Also, they should have moved to exclude testimony of Dr. White, who performed the autopsy on Holden.[13] The record belies petitioner's allegations. The jury clearly understood that everyone in the tank where Holden was killed was considered dangerous. See, e.g., 40 RR 47-48, 84, 86. At the time of trial, Seely was a convicted felon, serving a two-year sentence for family assault. 40 RR 7. Petitioner's counsel established that to get a felony conviction for family assault, Seely must have previously beaten someone. 40 RR 41-42. He also had other convictions and was up for parole, certainly giving him reason to testify favorably to the State. 40 RR 42-44. The evidence also established that an officer had checked on Holden when a call was made that he might want to hurt himself and Holden denied any such intent.[14] 40 RR 72-75. Petitioner's counsel established that the officer who first discovered Holden thought he had committed suicide. 40 RR 111. In examining Dr. White, counsel emphasized for the jury that Holden's injuries were very nonspecific

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[13] In a footnote, petitioner argues that his counsel did not adequately question how his DNA could have been transferred to Holden's fingernails. The argument is wholly conclusory and speculative.

[14] Had Holden been suicidal, he would not have been in that facility. 40 RR 103; 43 RR 23-25.

and that the homicide conclusion was reached based on the sheriff's report. 40 RR 144-45, 149. Further, Holden could have leaned into the blanket to kill himself. 40 RR 146. Petitioner's counsel presented the testimony of John Plunkett, a board-certified pathologist, who testified that there was nothing to support Seely's testimony that petitioner had pulled Holden up against the bars of the cell to choke him. 43 RR 30-32. And, Holden must have been an active participant in his own death. 43 RR 35-36.

In sum, petitioner has no legitimate complaint about his counsel's presentation in regard to Holden's death. He has not shown that, in light of all the circumstances, his counsel's omissions were outside the wide range of professionally competent assistance. Strickland, 466 U.S. at 690.

Finally, petitioner contends that his counsel failed to reasonably investigate, develop, and present evidence about his background and mental health. Unlike the contentions regarding his counsel's failure to establish his minimal role in the offense and the failure to show that Holden's death was a suicide, this contention was the subject of the first ground of the state habeas petition and, as stated previously, petitioner cannot now rely on new evidence to plow this ground again. Pinholster, 563 U.S. at 181-82.

The record makes abundantly clear that petitioner has no redeeming qualities. His trial counsel searched exhaustively for mitigating evidence and found very few people who were willing to testify on petitioner's behalf. Those who did gave no indication that petitioner suffered a traumatic childhood full of abuse. Petitioner's sister testified that their mother

spanked him, 43 RR 228-29, not that she abused him, as petitioner now contends. And, the relatives petitioner now relies on to establish his version of events say that, although his mother had a temper, it was not with her children, to whom she acted more like a friend. Doc. 29 at 1475. Petitioner complains that his counsel "dumped thousands of pages of documents" on their expert,[15] but does not cite to any evidence in those thousands of pages to support his claim of horrific childhood abuse. Doc. 25 at 37. Instead, he wants the court to believe his statements to Dr. McGarrahan that he suffered abuse, Doc. 25 at 36, but disbelieve his statements to her that he never harmed himself. Doc. 25 at 38. His real complaint is that Dr. McGarrahan independently reviewed the records and interviewed petitioner, disbelieving much of what he told her.[16] And, based on "the devastating extent of [petitioner's] abandonment and deprivation," Doc. 25 at 43, which is supported by the record, counsel decided that the best mitigating evidence was that petitioner's brain was so changed by events beyond his control that he did not deserve

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[15] One of petitioner's complaints is that counsel failed to provide "direction or assignment" and gave the expert "nothing to generate a roadmap," Doc. 25 at 38, as though counsel should have told the expert what conclusions to reach.

[16] Petitioner notes that his trial counsel hired a second expert in the field of forensic and clinical psychology, but dismissed him after meeting with him twice. Doc. 25 at 35, n. 25. (This allegation is made in support of the contention that trial counsel did not explore any alternative experts.) A logical "explanation" for the dismissal would be that the second expert did not have as favorable an opinion about petitioner as Dr. McGarrahan.

the death penalty.[17] That was a decision counsel were entitled to make. Pinholster, 563 U.S. at 197 (experienced lawyers may conclude that the jury simply won't buy a particular trial tactic); Strickland, 466 U.S. at 689.

Even assuming petitioner could meet the first part of the Strickland test, and he cannot, he cannot show that there is a reasonable probability that, but for the ineffective assistance of his counsel, the jury would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.[18] 466 U.S. at 695. Petitioner's future dangerousness was established beyond a reasonable doubt given the overwhelming evidence of his participation in the murder and conduct thereafter. That petitioner's new expert would have attributed his behavior to PTSD or any other cause does not establish that petitioner is not a continuing danger to society. Likewise, there is no question that petitioner intended to cause Dobson's death or knew he would be killed. Petitioner's testimony to the contrary was simply incredible and the evidence at trial established that petitioner was present during the beatings of Dobson

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[17] Petitioner now wants to argue that his criminality is attributable to trauma, Doc. 25 at 41, overlooking that Dr. McGarrahan testified that emotional unavailability and neglect were worse psychologically than physical abuse. 43 RR 244.

[18] With regard to this part of the test, the court notes that petitioner's proffered juror declarations are not appropriate for consideration. Young v. Davis, 835 F.3d 520, 528-29 (5th Cir. 2016); Summers v. Dretke, 431 F.3d 861, 873 (5th Cir. 2005). But, they do not show a reasonable probability of a different outcome in any event.

and Elliot. As in Santellan, 271 F.3d at 198, there is not a reasonable probability that the jury would have answered the mitigation special issue differently. Petitioner's new expert points out, just as Dr. McGarrahan did, that "traumatic and adverse experiences and circumstances exert a deleterious impact on the developing brain and negatively disrupt [] psychosocial development and functioning." Doc. 25 at 65. In other words, petitioner's new expert agrees that petitioner's brain did not develop as it should have and he is the way he is, whatever the cause. As his trial counsel noted, "if that's not mitigating, there is no mitigation in a death penalty case." 44 RR 23. The jury was not persuaded and petitioner has not shown that a new theory of cause would make any difference.

B. Failure to Secure a Fair Trial Environment

In his second ground, petitioner urges that his counsel's failure to object to violations of his fair-trial rights and otherwise secure a fair trial environment constituted ineffective assistance of counsel. Specifically, he complains that counsel failed to diligently seek a change of venue and failed to object to his shackling and wearing of a stun cuff. Once again, petitioner attempts to gain de novo review by pairing an exhausted with an unexhausted claim and arguing in a conclusory fashion that he was prejudiced.

The Sixth Amendment guarantees a criminal defendant to a speedy and public trial by an impartial jury. The failure to provide such a trial is a denial of due process. Irvin v. Dowd, 366 U.S. 717, 722 (1961). However, the Constitution does not require that

jurors be completely ignorant of the facts and issues to be tried. Dobbert v. Florida, 432 U.S. 282, 302 (1977).

As was the case in Dobbert, petitioner's argument that extensive media coverage[19] denied him a fair trial rests almost entirely upon the quantum of publicity the events received. 432 U.S. at 303. Petitioner does not cite to specific portions of the record, in particular the voir dire examination, that would require a finding of constitutional unfairness as to the method of jury selection or the character of the jurors actually selected. Id. He makes no attempt to show that his case has anything in common with those where the Supreme Court has approved a presumption of juror prejudice. For instance, he includes no discussion of size and characteristics of the community in which the crime occurred or any detail about the news stories, e.g., that they contained any confession by petitioner or other blatantly prejudicial information of a type that readers or viewers could not reasonably be expected to shut from sight. Skilling v. United States, 561 U.S. 358, 382-83 (2010). As the Fifth Circuit has noted, the rule of presumed prejudice is applicable only in the most unusual cases. Busby v. Dretke, 359 F.3d 708, 725 (5th Cir. 2004). This is not one of them and petitioner has made no attempt to show that it is.

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[19] The articles to which petitioner refers were published after the trial began. Doc. 25 at 68, n. 39 & 40. He does not make any attempt to substantiate the claim that the publicity in his case in any manner compares to that in Sheppard v Maxwell, 384 U.S. 333 (1966), upon which he relies.

The record reflects that petitioner's trial counsel filed a motion for change of venue. 2 CR 305-10. The State filed a response, 2 CR 320-23, and the court carried the motion. 6 RR 50. The motion was re-urged as part of a motion for mistrial, 2 CR 369, but was apparently not pursued thereafter. Nothing in the record would have supported the granting of the motion and counsel cannot be faulted for having failed to pursue a losing motion. See Clark v. Collins, 19 F.3d 959, 966 (5th Cir. 1994); Koch v. Puckett, 907 F.2d 524, 527 (5th Cir. 1990).

The second part of this claim is that counsel should have objected to petitioner's being shackled and wearing a stun cuff during his trial. Petitioner falsely says that this claim is unexhausted. Doc. 25 at 72. It was raised as claim for relief number ten by habeas counsel. 1 CHR 90-91. The trial court made extensive fact findings and conclusions of law as to the claim, 2 CHR 323-27, and the Court of Criminal Appeals denied relief. Ex parte Nelson, 2015 WL 6689512. Yet, in his reply, petitioner continues to maintain that the claim is unexhausted. Doc 54 at 19. And, he makes the conclusory allegation that even if exhausted, the state court's decision would be contrary to Supreme Court precedent, id., ignoring the fact findings that support the use of additional security at trial. Petitioner in effect argues that the trial judge was required to specifically state, "I am 'exercising [my] discretion to take into account security concerns,'" or words to that effect, relying on Deck v. Missouri, 544 U.S. 622, 633-34 (2005). Doc. 54 at 20. However, the defendant in Deck specifically and repeatedly objected to being shackled. That was

not the case here.

The court's attention has not been drawn to any case requiring the trial court to make gratuitous fact findings as to a matter about which no complaint has been made. Based on the record, and in particular, the habeas findings and conclusions, counsel were reasonable in their determination not to complain about the additional security measures. Petitioner has not shown that this ruling was unreasonable. And, even if counsel should have complained more vigorously, this is the exceptional case where the record itself makes clear that there were indisputably good reasons for shackling. See Deck, 544 U.S. at 635.

C. Batson Claims

In his third ground, petitioner alleges that he was sentenced to death by an all-white jury from which the State systematically struck nonwhite prospective jurors. He seeks relief under Batson v. Kentucky, 476 U.S. 79 (1986). In Batson, the Court set forth a three-step process for determining when a strike is discriminatory:

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

Foster v. Chatman, 136 S. Ct. 1737, 1747 (2016) (quoting Snyder v. Louisiana, 552 U.S. 472, 476-77

(2008)). The trial court has a pivotal role in evaluating Batson claims since the third step involves an evaluation of the prosecutor's credibility. Batson, 476 U.S. at 98 n. 21. The best evidence of discriminatory intent often will be the demeanor of the attorney who exercises the challenge. Hernandez v. New York, 500 U.S. 352, 365 (1991). In addition, the demeanor of jurors, for example their nervousness or inattention, may determine whether a proffered reason for striking a juror is mere pretext. Snyder, 552 U.S. at 477. Thus, the trial court's rulings must be sustained unless clearly erroneous. Id. And, on federal habeas review, state court decisions are to be given the benefit of the doubt. Felkner v. Jackson, 562 U.S. 594, 598 (2011). The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. Purkett v. Elem, 514 U.S. 765, 768 (1995).

> Petitioner raised his Batson challenge on direct appeal:
>
> In appellant's fifth point of error, he claims that the trial court violated the Equal Protection Clause by overruling his *Batson* objections to the State's peremptory strikes of two minority venire members.
>
> A *Batson* challenge involves three steps: (1) there must be a prima facie showing that a venire member was peremptorily excluded on the basis of race; (2) the striking party must then tender a race-neutral reason for the strike; and (3) if a race-neutral reason is tendered, the trial court must then determine whether the objecting party has proved

purposeful discrimination. The trial court's ruling on a *Batson* challenge is sustained on appeal unless it is clearly erroneous. This highly deferential standard is employed because the trial court is in the best position to determine whether the State's justification is actually race-neutral. A defendant's failure to offer rebuttal to a prosecutor's race-neutral explanation can be fatal to defendant's claim.

Appellant raised a *Batson* challenge regarding five venire members. The trial court found that he had made a *prima facie* case, so the burden shifted to the State to tender race-neutral explanations. The State noted which black and Hispanic minority members were struck by the defense, then proffered explanations for the five challenged venire members: Venire member Spivey slept during instructions from the bench and denied arrests that the State was aware of, claimed that he did not want to serve on the trial because he did not believe appellant would get a fair trial, explained that he did not want to sit around on jury service without being paid overtime, and indicated that he had trouble sitting in judgment of other people. Venire member Lee-Moses indicated that she was not in favor of the death penalty regardless of the facts or circumstances of the case. She also would have problems with a "circumstantial case," and she believed the death penalty had been used unfairly in the past. Venire member Southichack indicated that she has a problem judging. She was not in

> favor of the death penalty, and she did not believe it should ever be invoked. She seemed to the prosecutors to have difficulty with the legal issues related to the special issues. She also said she would have trouble answering question number two "yes" if she believed appellant was not the trigger person. Venire member Hooper Golightly belonged to a church that was opposed to the death penalty, and she did not disagree with that position. She was not in favor of the death penalty, and she thought it should never be invoked. Venire member Mays served on a trial that resulted in a mistrial. She thought the death penalty should never be invoked, and it was not on the top of her list for a possible punishment,
>
> The trial court found that the State "offered reasonable, race-neutral reasons" for its peremptory strikes against the challenged members. Appellant then pointed out that three of the members that the State exercised peremptory strikes on were not challenged for cause, and said "the record speaks for itself."
>
> Appellant failed to rebut the State's race-neutral reasons for its strikes, and the record supports the trial court's determination that the State did not engage in purposeful discrimination. His fifth point of error is overruled.

Nelson, 2015 WL 1757144, at *10-11 (footnotes omitted).

Petitioner argues that he is entitled to merits

review of his Batson claim because the state court decision "involved an unreasonable application of clearly established federal law" in that the court did not engage in a comparative juror analysis. Doc. 25 at 88. However, there is no evidence to support this contention. Clearly, petitioner requested a comparative juror analysis on direct appeal. Appellant's Opening Brief at 71 (citing Young v. State, 848 S.W.2d 203 (Tex. App.--Dallas 1992, pet. ref'd)). And, the Court of Criminal Appeals determined that the record supported the trial court's ruling that the State did not engage in purposeful discrimination. Nelson, 2015 WL 1757144, at *11. There is no requirement that there be a state court opinion explaining the court's reasoning. Richter, 562 U.S. at 98.

Even if petitioner could show that the state court failed to engage in a comparative juror analysis, and he cannot, petitioner has admitted that he failed to carry his burden at the third step of the Batson analysis. Doc. 25 at 74. The conclusion that there was no purposeful discrimination cannot have been erroneous.[20]

Finally, and in an abundance of caution, the court has considered petitioner's comparative analysis and finds that petitioner would not be entitled to relief on his Batson ground in any event. His statistical

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[20] Petitioner also asserts that the opinion of the Court of Criminal Appeals was based on an unreasonable determination of the facts. However, he concedes that Fifth Circuit law forecloses this argument. Doc. 54 at 21, n.15.

analysis, assuming it is proper,[21] merely—raises the issue of discrimination at the first step of the analysis and does not overcome the race-neutral explanations of the State. Of further note is that the facts of this case are wholly unlike those of Foster and Miller-El, where circumstantial evidence, such as shifting explanations for juror strikes, mischaracterizing the record by the State, persistent focus on race in the prosecutors' file, use of a graphic script, trickery, and a policy of the prosecutor of excluding African Americans, heavily weighed in favor of the discrimination findings. Foster, 136 S. Ct. at 1754; Miller-El v. Dretke, 545 U.S. 231, 253-64 (2005). And, petitioner's comparative analysis fails to establish legal error, because fair-minded jurists could disagree on the correctness of the state court decision. Davis v. Ayala, 135 S. Ct. 2187, 2199 (2015).

The State exercised a peremptory strike against Martima Mays ("Mays"), giving the explanation:

> She served on a jury that resulted in a mistrial. She also, with regard to several questions on her questionnaire, wrote, I have not thought about it, in regard to her feelings on the death penalty.
>
> She believed that the death penalty should never be invoked. She again writes, I've not thought about it, for two more questions dealing with the death penalty, but that she

[21] The analysis is questionable since the juror questionnaires are not part of the record before the court. Accordingly, the court is not considering them. See Reed v. Quarterman, 555 F.3d 364, 375 n.6 (5th Cir. 2009).

> would not lose any sleep over the fact that she did not get picked.
>
> She also believed that the death penalty was not at the top of her list for a possible punishment for a crime. She hesitated during questioning with regard to Question No. 2 with the parties issue.

31 RR 20.

Petitioner says that the State accepted a white panelist, David Defalco ("Defalco"), who had prior jury service on a capital murder case where the death penalty was not imposed and that Defalco posed a greater danger to the State than did Mays. Doc. 25 at 77. The contention is absurd. The record reflects that petitioner challenged Defalco for cause based on his saying that there would be a "very, very, very small likelihood" of him voting no to the second penalty phase question if the first question had been answered "yes." 10 RR 139-40. Defalco had earlier stated that he thought the death penalty should be imposed more often. 10 RR 85.

Petitioner next contends that five white veniremembers had similar reservations about the death penalty, but the State accepted them. Doc. 25 at 78-79. The court is satisfied that the other panelists were not in the same position as Mays. But, even assuming Mays' position was comparable, she still stands apart because of her prior service on a jury that could not reach a decision. Mays was not frustrated by that outcome. 28 RR 156. In addition, she said that death was not at the top of her rating for punishment. 28 RR 159-60. And, contrary to

petitioner's contention, the record clearly reflects that Mays hesitated in responding to the question whether she could judge another. 28 RR 171. Petitioner has not shown that Mays was struck for discriminatory reasons.

Petitioner next argues that Sheracey Golightly Hooper ("Hooper") was struck for pretextual reasons. The State explained its reasoning as follows:

> . . . Hooper indicated on her questionnaire her church's position on the death penalty was thou shalt not kill; therefore, no one has the right to kill. She did not find herself in disagreement wit this principle. She also indicated that she was not in favor of the death penalty because she did not believe we had the right to kill one another and that she believed that the death penalty should never be invoked.

31 RR 19.

Hooper explained that she was not generally in favor of the death penalty, because she did not believe we have a right to kill one another. 27 RR 12. That was her opinion even though she said she could follow the laws of the land. 27 RR 12, 13. She believed the death penalty should not be used at all. 27 RR 14¬15. Rebecca Cardona, on the other hand (to whom petitioner compares Hooper), clearly stated that the death penalty would "absolutely" be appropriate in some circumstances. 28 RR 256. Her answers indicated that she would not be bound by the Catholic Church's stance on the death penalty, reciting other ways she had strayed from its teachings. 28 RR 289. These jurors were not in the same position.

Petition next addresses Talmadge Spivey ("Spivey"), Saying that he was similarly situated to panel members who were not struck. The State explained the reasons for striking Spivey as follows:

> With regard to Mr. Spivey whose original number was 41, during our initial meeting on August 2nd, he slept during your instructions and most of our time downstairs in the Central Jury Room. He denied arrests on his questionnaire. He actually had two, one in 1998 and one in 2010. He checked he did not want to serve on the jury because he did not believe the Defendant could get a fair trial. He also indicated that he did not like jury service because he didn't want to sit around all day and that he works a lot of forced overtime, so he did not think he wanted to be on the panel. And he had problems sitting in judgment of other people.

31 RR 17-18. Petitioner says that each of these reasons is pretextual.

Petitioner mischaracterizes the first reason given for striking Spivey. He was not stricken because of his working nights, but rather because he actually slept through the instructions and most of the time in the Central Jury Room. The record does not reflect that veniremember Crews, to whom petitioner compares Spivey, actually slept through the proceedings.

Petitioner next compares Spivey to Henry Hackbusch. The prosecutor said that Spivey had two arrests that were not disclosed on his juror questionnaire. Petitioner does not have any evidence,

much less information, to the contrary. Hackbusch, on the other hand (and contrary to petitioner's allegation), stated on his questionnaire that he had been accused of breach of computer security. 9 RR 267. He also explained that he had contested a seat belt violation some 20-25 years earlier, but there is no reason to believe he was arrested on that charge. 9 RR 267, 269.

Petitioner next contends that Spivey would have been a good juror for the State despite his having checked that he did not want to serve on the jury because he did not think petitioner could get a fair trial. He tries to explain away Spivey's remarks that he only believed there could be a fair trial if people who looked like him were on the jury. He does not address the fact that Spivey said he did not want to serve.

Petitioner then jumps to the final reason given, that Spivey had problems sitting in judgment of other people, saying that other veniremembers felt the same way. Even if true, however, this is not a ground for relief since there is no evidence that these other people likewise did not like jury service because they did not want to sit around all day, they worked a lot of overtime, and they did not think they wanted to be on the panel.

31 RR 17-18.

Finally, petitioner argues that the State's reasons for striking Somsouk Southichack ("Southichack") were pretextual. The prosecutor explained:

> Ms. Southichack . . . indicated on her questionnaire that she has a problem judging.

> She believed that if someone committed a crime, they should get a fair trial, but she did not want to be a jury member for that because she had issues with judgment. She also indicated on her questionnaire she was not in favor of the death penalty. She also indicated that she did not believe that it should ever be invoked.
>
> She had a couple of issues understanding some of the legal issues that Mr. Gill was trying to explain to her during the individual voir dire portion. She was very hesitant when asked if the State proved beyond a reasonable doubt, could you actually find someone guilty, because she was indicating that she had problems with judging someone if it led to a capital murder conviction.
>
> She also indicated that she did not agree with the second part of Question No. 2, the parties question and believed she would have trouble answering that yes if she believed that this person was not the trigger person.

31 RR 18-19.

Petitioner admits that Southichack's responses to the juror questionnaire were "equivocal." Doc. 25 at 86. Her responses during voir dire were no better. She said she "wouldn't be able to make a judgment on another human being," 21 RR 33, then she said she would be able to follow her oath, id. Again, when asked if she could carry out her duties as a juror, she said that she did not know how to answer that question. 21 RR. 32. With regard to the legal issues,

Southichack said proving intent would be really hard and it would be up to the sides to prove it. 21 RR 43. She also expressed confusion over the definition of reasonable doubt. 21 RR 48. And, she said she did not know if she agreed with the law of parties. 21 RR 52-56. She also expressed confusion as to how consideration of mitigating evidence would work. 21 RR 76-80. The State challenged Southichack for cause. 21 RR 82, 92-93. After additional questioning by petitioner's counsel, then the trial judge, who noted that Southichack had given different answers, the challenge was denied. 21 RR 105. Petitioner does not cite to any other juror who gave as many conflicting answers or who had so much trouble understanding the issues. He has not shown that the State's reasons for striking Southichack were pretextual.

D. Ineffective Assistance re Batson Claim

In his fourth ground, petitioner says that his counsel were ineffective in failing to properly litigate the third step of the Batson claim process. Doc. 25 at 90. As previously discussed, petitioner did raise ineffective assistance of counsel in his state habeas petition. Thus, Martinez and Trevino do not provide relief with regard to this claim. Further, and in any event, for the reasons discussed in the preceding section of this memorandum opinion and order, petitioner could not have prevailed on his Batson claims. His counsel cannot have been ineffective in failing to pursue losing arguments. United States v. Kimler, 167 F.3d 889, 893 (5th Cir. 1999).

E. Napue/Giglio Violation

In his final ground, petitioner contends that he

was deprived of due process as set forth in Napue v. Illinois, 360 U.S. 264 (1959), and Giglio v. United States, 405 U.S. 150 (1972), because the State knowingly allowed Ricky Seely to testify falsely that he had made no deal with prosecutors and did not expect any benefits in exchange for his testimony at trial. Petitioner bases this argument on a declaration signed by Seely on December 9, 2016,[22] and a letter from Seely to the prosecutor dated January 4, 2013,[23] which petitioner claims was discovered on August 16, 2016 by his federal habeas counsel. Doc. 25 at 100. This issue was not raised on direct appeal or in the state habeas proceeding.

Petitioner admits that this ground is unexhausted, but says that he can now present it to the state court because the factual basis for the claim was unavailable at the time of his state habeas filing. Doc. 25 at 99-100. As he admits, however, the January 4, 2013, letter was in the prosecutors' files. That his counsel only recently discovered it does not mean that the factual basis of the claim could not have been timely discovered with the exercise of due diligence.

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[22] As respondent notes, the declaration was not included in the original petition. Doc. 41 at 141, n.57. Its inclusion in the amended petition does not relate back to the original so as to make it timely. Mayle v. Felix, 545 U.S. 644, 662-63 (2005).

[23] Petitioner says that the letter expresses Seely's understanding of a reduced sentence in exchange for his testimony against petitioner and asks that the prosecutors "please assist [him] once more." Doc. 25 at 98. The court notes that the letter was written after the trial and thus would not have been required to be disclosed by the State. Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 68-69 (2009).

Tex. Code Crim. Proc. art.11.071, § 5(e).[24] And, in fact, there is no reason to believe that petitioner's state counsel were not aware of the letter.

Even assuming petitioner could now present this claim, he cannot show that it has any merit. The letter is entirely consistent with Seely's testimony at trial. It does not say that any promise or deal was made before he testified.[25] Doc. 26 at 269. More importantly, the letter establishes that Seely's testimony regarding petitioner's murder of Holden was true and that Seely has suffered as a result of his having testified.

Seely describes petitioner's conduct as a "horrific crime" and that he is "[scarred] for M life by seeing the crime as it happened." Doc. 26 at 270.[26]

To establish a due process violation as alleged here, petitioner must show that Seely's testimony was actually false, that it was material, and that the prosecution knew that the testimony was false. Fuller v. Johnson, 114 F.3d 491, 496 (5th Cir 1997) He has

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[24] Petitioner does not argue in his amended petition that his trial counsel or habeas counsel were ineffective for having failed to discover the letter or urge this ground in state court. The court will not consider an argument raised for the first time in a reply.

[25] The court notes that the declaration proffered by petitioner is inconsistent with the letter in that it says that both prosecutors were present at all meetings, whereas the letter is telling the recipient that the other prosecutor said that they would help him get parole. Doc. 26 at 269; Doc. 29 at 1477.

[26] Even if Seely truly meant that he was "scared for my life by seeing the crime as it happened," the sentiment is the same. He witnessed a horrific crime. Doc. 26 at 270.

not met this burden. Even if he had, however, a new trial is only required if the false testimony could in any reasonable likelihood have affected the judgment of the jury. A new trial is not automatically required where the evidence that was withheld might have been useful to the defense but was not likely to have changed the verdict. Giglio, 405 U.S. at 154. In this case, as recited earlier, and as respondent notes, Doc. 41 at 148-50, the evidence that petitioner killed Holden is solid. Moreover, from the cross-examination of Seely, the jury could easily have surmised that he expected something in return for his testimony, whether he actually had a deal or not. Petitioner has not shown that there is a reasonable likelihood that the outcome of the trial would have been different absent the alleged false testimony.

VI.

Other Motions

Also pending are motions (denominated "applications") of petitioner for (1) reasonably necessary funds for a fact investigator, (2) for reasonably necessary funds for an expert in life-long incarceration, and (3) for reasonably necessary funds for a psychiatric expert. The court, having considered the motions, the response of respondent, the record, and applicable authorities, finds that the motions should be denied. Petitioner has not met his burden of showing that any of the requested services are reasonably necessary for his representation

In addition, petitioner has filed a motion for stay and abatement pending exhaustion of state remedies. In light of the court's rulings in this memorandum

opinion and order, the motion is moot. No legitimate purpose would be served by granting the relief sought.

VII.

Order

The court ORDERS that all relief sought by petitioner through his amended petition and through the motions described in the preceding section of this memorandum opinion and order be, and is hereby, denied.

SIGNED March 29, 2017.

/s/
JOHN McBRYDE
United States District Judge

APPENDIX D

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-82,814-01

EX PARTE STEVEN LA WAYNE NELSON

ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS FROM CAUSE NO. 1232507D IN CRIMINAL DISTRICT COURT FOUR TARRANT COUNTY

Per Curiam.

O R D E R

This is an application for a writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071.

In October 2012, a jury found applicant guilty of the offense of capital murder committed in March 2011. The jury answered the special issues submitted pursuant to Texas Code of Criminal Procedure Article 37.071, and the trial court, accordingly, set applicant's punishment at death. This Court affirmed applicant's conviction and sentence on direct appeal. *Nelson v. State*, No. AP-76,924 (Tex. Crim. App. April 15, 2015).

Applicant presents seventeen allegations in his application in which he challenges the validity of his conviction and resulting sentence. The trial court did not hold an evidentiary hearing. The trial court entered findings of fact and conclusions of law recommending that the relief sought be denied.

This Court has reviewed the record with respect to

the allegations made by applicant. Based upon the trial court's findings and conclusions and our own review, we deny relief.

IT IS SO ORDERED THIS THE 14th DAY OF OCTOBER, 2015.

Do Not Publish

APPENDIX E

No. C-4-010180-1232507-A

EX PARTE	§	IN THE CRIMINAL
	§	DISTRICT COURT
	§	NUMBER FOUR OF
STEVEN LAWAYNE NELSON	§	TARRANT COUNTY,
	§	TEXAS

ORDER

Having carefully reviewed the State's Proposed Memorandum, Findings of Fact, and Conclusions of Law, and having further determined that the proposed findings are supported by the record and that the conclusions are legally sound, the Court hereby orders, adjudges, and decrees that these proposed findings of fact and conclusions of law are adopted as the Court's own. The Court further orders and directs the Clerk of this Court to:

1. File these findings and transmit them along with the Writ Transcript to the Clerk of the Court of Criminal Appeals pursuant to. TEX. CODE CRIM. PROC. ANN. art. 11.071, § 9(f).

2. Furnish a copy of this Order to Applicants attorney John W. Stickels, at P.O. Box 121431, Arlington, TX, 76012, or at his most recent address, by mailing said document by United States mail.

3. Furnish a copy of this Order to the appellate, section of the District. Attorney's Office.

SIGNED AND ENTERED on this the 29 day of January, 2015

/s/ Mike Thomas
JUDGE PRESIDING

No. C-4-010180-1232507-A

EX PARTE	§	IN THE CRIMINAL
	§	DISTRICT COURT
	§	NUMBER FOUR OF
STEVEN LAWAYNE NELSON	§	TARRANT COUNTY,
	§	TEXAS

STATE'S PROPOSED MEMORANDUM., FINDINGS OF FACT, AND CONCLUSIONS OF LAW

COMES NOW, The State of Texas, by and through the Criminal District Attorney of Tarrant County, Texas, and files its proposed memorandum, findings of fact, and conclusions of law.

MEMORANDUM

A Tarrant County jury convicted Applicant of capital murder. In accordance with the jury's answers to the special issues, this Court sentenced Applicant to death. Applicant's direct appeal is currently pending in the Court of Criminal Appeals of Texas as *Steven Lawayne Nelson v. The State of Texas*, No. AP-76,924.

The current application, which is Applicant's first, was filed pursuant to TEX. CODE CRIM. PROC. art. 11.071 on April 15, 2014. The Court granted the State an extension of time to file its response, and the State timely filed its reply to each of Applicant's claims on October 13, 2014.

On November 24, 2014, this Court found that there existed no controverted, previously unresolved factual issues material to the legality of Applicant's

confinement. The Court ordered the parties to file proposed findings of fact and conclusions of law within thirty days of the Court's order.

The Court has considered the Application for Writ of Habeas Corpus, the State's Reply to Application for Writ of Habeas Corpus, all of the exhibits and materials filed by each party, and the entire record of the trial and habeas proceedings. Where appropriate, the Court has used its personal recollection as permitted under TEX. CODE CRIM. PROC. art. 11.071, § 9(a). Based on its review of the record, the Court makes the following findings of fact and conclusions of law regarding Applicant's claims and recommends that relief be denied:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A.

CLAIM ONE

Applicant alleges, that he was denied effective assistance of counsel at trial with. regard to: the investigation and presentation of mitigation evidence because counsel failed to: (1) investigate and discover relevant and important mitigation evidence; (2) develop a consistent and effective mitigation strategy; (3) use exhibits to help the jury visualize and remember mitigation information; (4) show the jury "that Many 'choices' were made for [Applicant] before he was capable of making 'choices' for himself"; and (5) conduct' a mitigation investigation that met the ABA Guidelines. [Application at 31-40.]

Findings of Fact

1. On March 14, 2011, this Court appointed William H. "Bill" Ray and Stephen Gordon to represent Applicant at his capital-murder trial in cause number 1232507D. [CR I: 28-29.]

2. Ray and Gordon have each filed a court-ordered affidavit in this habeas proceeding to address Applicant's claims that counsel provided ineffective assistance at trial. [Affidavit of William H. "Bill" Ray (hereinafter "Ray's affidavit"); Affidavit of Stephen Gordon in Response to Writ of Habeas Corpus (hereinafter referred to as "Gordon's affidavit").]

3. Ray and Gordon are both highly experienced attorneys who were well-qualified to represent Applicant at his capital-murder trial. [*See* Ray's affidavit-at 1-2; Gordon's affidavit at 1.]

4. Trial counsel filed, and the. Court granted, motions to appoint Mary Burdette to provide services as a mitigation specialist and Wells Investigation to provide investigator services: [CR 1: 35-39.]

5. Ray and Gordon complied with-prevailing professional norms by conducting a thorough mitigation investigation. [*See* Ray's affidavit at 2-5; Gordon's affidavit at 1-3.]

6. Ray and Gordon became fully versed in and knowledgeable of the information against Applicant contained in the State's file. [Gordon's affidavit at 1.]

7. Due to the allegations of the indicted capital-

murder case and the subsequent allegations of Applicant's severe misconduct while awaiting trial, Ray and Gordon, knew, that most, of their time would be spent trying, to build, a strong mitigation case. [Gordon's affidavit at 2.]

8. Ray and Gordon visited Applicant numerous times during the pendency of this capital-murder case. [Ray's. affidavit at 4; Gordon's affidavit at 2.]

9. Ray and Gordon discussed their concerns and strategies with Applicant in order to keep him informed and to afford him every opportunity to assist counsel in preparing his defense. [Gordon's affidavit at 2.]

10. Applicant was helpful at times, but he was limited in his ability to assist the defense team in finding useful witnesses because he had spent so much of his life incarcerated as a juvenile or young adult. [Gordon's affidavit at 2.]

11. Applicant was unable to provide the name of any childhood friend, and he never provided the name of a teacher or other school friend. [Ray's affidavit at 4-5.]

12. Although Applicant told Ray that he would get the names of cousins and others in Ada, Oklahoma, where Applicant grew up, he did not do so. [Ray's affidavit at 4.] Applicant's mother later provided some of those names to the defense team. [*Id*.]

13. There were not many witnesses regarding Applicant's background who were discoverable or suitable, to assist in what, Ray and Gordon expected to be a mitigation-based defense in. an

attempt to Spare Applicant's life. [Gordon's affidavit at 2.]

14. The mitigation attached to Ray's affidavit was compiled by the defense team's. mitigation specialist, and contains the names of people who were contacted, notes concerning the contacts, various evidentiary items, and the results . of .the inquiries. [Ray's affidavit at 5; *see* "People List," attached to Ray's affidavit.]

15. On July, 26, 2012, Applicant told Ray that his mother had telephone numbers for Christina Strothers and Cecilia Castleberry. [Ray's affidavit at 4.] However, neither woman would return the defense team's telephone calls. [*Id.*]

16. Ray and Gordon visited Oklahoma several times in order to speak with and locate witnesses, to investigate, mitigation and other matters concerning Applicant's early life, and to gather any documentary evidence they could find. [Ray's affidavit at 2-3; Gordon's affidavit at 2.]

17. The defense team's private investigator and mitigation specialist accompanied counsel on the first trip to Oklahoma to investigate Applicant's mitigation case. [Ray's affidavit at 2-3.]

18. Ray and Gordon made a point to locate, Applicant's juvenile records adult criminal records; and medical records that would assist counsel in formulating a strong mitigation defense for Applicant. [Gordon's. affidavit at 2.]

19. The defense's psychological team and retained medical doctor reviewed Applicant's medical

history to assist in discovering any organic or other disability that Ray and Gordon did not know about or that had not been diagnosed. [Gordon's affidavit at 2.]

20. Ray and Gordon sent letters to various schools and school districts in Oklahoma, but there either was no record of Applicant attending the schools or the records had been destroyed. [Gordon's affidavit at 2]

21. Applicant's mother had not kept any of Applicant's school records. [Gordon's affidavit at 2.]

22. Many of Applicant's family members were unwilling to assist in Applicant's defense. [Gordon's affidavit at 2.]

23. Applicant's brother and sister were ,the most helpful family members, and they assisted the defense team .as much as they were able by trying to find telephone numbers and contacts for family members and friends. [Gordon's affidavit at 2.]

24. It was difficult to persuade Applicant's mother to assist the defense. Team. [Gordon's Affidavit at 2.] Gordon had to personally beg Applicant's mother to attend the trial, to testify on Applicant's behalf, and to attend strategy meetings and discussions. to assist Ray and Gordon in finding other witnesses or family members. [*Id.*]

25. Ray and Gordon called, the following witnesses to testify on Applicant's behalf as part of the mitigation case: Applicant's mother, brother, and sister; Gary Beal, who had been married to Applicant's maternal aunt since 1992; Jerome

Castleberry, who dated Applicant's mother in Oklahoma, for several years beginning when Applicant was about twelve years old and whose younger brother remained Applicant's good friend at the time of the charged offense; Deanna Carpici, an employee of the Chicasaw Nation Medical Center who saw Applicant as a child when he was a patient at the hospital's behavioral health department; and Dr. Antoinette McGarrahan, the defense's forensic psychologist and neuropsychologist who. evaluated Applicant. [*See generally* RR 43: 115-277.]

26. Other than the persons who testified at Applicant's trial, there were no other witnesses who could provide any substance or say good things about Applicant. [Ray's affidavit at 3.]

27. Although other names were provided to Ray and Gordon, those persons either did not want to help Applicant, did not provide helpful information, had bad things to say about Applicant, or did not return the defense team's telephone calls. [Ray's affidavit at 3-4; Gordon's affidavit at 2.]

28. Applicant was not always open with Ray and Gordon. [Gordon's affidavit at 2.]

29. Ray and Gordon made every effort to discover and locate witnesses whose testimony would benefit Applicant's mitigation case, and they called the available lay and expert witnesses to testify on Applicant's behalf. [Ray's affidavit at 2-5; "People List," attached to Ray's affidavit; Letter from James E. Duncan, M.D., attached to Ray's affidavit; Gordon's affidavit at 2; see generally RR

43: 115-277.]

30. Ray and Gordon conducted: a full .investigation into relevant areas. of mitigation that included seeking out relevant records, lay :witness testimony, and expert testimony and assistance. [Ray's affidavit at 2,6; "People List," attached to Ray's affidavit; Letter from James E. Duncan, M.D., attached to Ray's affidavit; Gordon's affidavit 2.]

31. Although Applicant claims that he has "many family members, friends[,] and former teachers, who could have testified in his behalf at 'the punishment phase of -his trial, he fails to-identify a single undiscovered or uncalled witness, to set forth what testimony such -a witness could have provided, or to demonstrate how such witness' testimony would have benefitted him. [Application at 33-35.]

32. Applicant's allegations about potential witnesses whom he has not identified are general and conclusory.

33. Applicant offers no proof, that further investigation would have uncovered any other available, beneficial witness. [*See* Application at 31-40.]

34. A review of the witnesses and evidence at trial refutes Applicant's allegation that Ray and Gordon relied either solely or primarily on Dr. McGarrahan to present Applicant's mitigation. case. [*See* Application at 35-36.]

35. Ray and Gordon were not required to present

Applicant's mitigation case in any particular manner or to present any particular evidence. Rather, presentation of the mitigation case is necessarily dictated by the beneficial available evidence uncovered during a thorough mitigation investigation.

36. Applicant offers no proof of what, if any, additional witnesses or records could have been discovered and presented at trial, and he makes no showing of how such evidence would have tipped the scales to persuade the jury to answer the mitigation special issue "yes" instead of "no." [*See* Application at 35-36.]

37. Applicant neither sets forth any specific evidence that could or should have been incorporated into visual aids nor explains how such visual aids would have rendered Applicant's mitigation case persuasive enough to convince Applicant's jury to answer the mitigation special issue differently. [Application at 36.]

38. Prevailing professional norms do not require counsel in a death-penalty trial to process mitigating evidence into any particular format or type of exhibit because no set of detailed rules can completely dictate how to best represent a criminal defendant.

39. Prevailing Professional norms do not require counsel in a death-penalty trial to present mitigating evidence about how "choices" made by others when a defendant was young affected a defendant's later "choices in life."

40. Beyond unsupported allegations, speculation, and

conclusions, Applicant presents no evidence that any of his behaviors at issue resulted from the alcohol use of others, that he suffers from Fetal Alcohol Syndrome ("FAS"), or that any of the information in the articles he cites about "sons of alcoholics" or FAS pertains to him. [*See* Application at 36-38.]

41. Applicant neither discusses the evidence introduced at trial establishing the same or similar facts that Applicant alleges Ray and Gordon should have presented nor demonstrates what other noncumulative beneficial evidence was available to Ray and Gordon at trial. [*See* Application at 36-38.]

42. The record contradicts Applicant's assertions that Ray and Gordon failed to present mitigating evidence about how the. "choices" of others when Applicant was young allegedly affected later "choices" made by. Applicant. [*See* Application at 36-37.]

43. Dr. McGarrahan specifically testified during direct examination about how "choices" made by others when Applicant was young, especially choices made by his parents, affected Applicant's "choices" later in life:

    Q. [DEFENSE COUNSEL] From the time [Applicant] was an infant until the time he sits here today, there have been choices that have been made, that probably could have been better choices. Would you agree with that?

    A. [DR. MCGARRAHAN] Made by [Applicant]?

Q. Yes.

A. Absolutely.

Q. Okay. Were there choices made by other people, at, least in his formative years, up until he was 11 or 12 years old, that might could have been made better that might have steered him in the right direction instead of the direction he's on that were made by other people?

A. Absolutely.

Q. Okay. And is it fair to say that the decisions the initial decisions you make in life when you're an infant, those are decisions that are made by somebody else?

A. Yes. You're not in control of those, you're not in control of your genetic vulnerabilities, you're not in control of who your parents are, how they treat you, what your circumstances ate.

Q. So, you know, up until the time he's — or any child, up until he's 6, or 7 years old, a lot of the decisions they make aren't theirs. In other words; they don't get to decide whether or not they go to the doctor, they don't get to decide what medicine they take, that sort of thing?

A. Correct.

* *

Q. Can you say in this case that up until

.the time that we were past the point of no return, that these decisions-were Steven's or were they somebody else?

A. They were essentially his mother's and his father's.

Q. Right or wrong, intentional or not, they were decisions that he didn't make?

A. Correct.

Q. And after we got to the point where there's no fixing it, then it became his decisions, he made bad decisions, clearly he's made lots of bad decisions, correct?

A. Yes.

Q. But we were after the point in time where, essentially, he could control his logical thinking: Would you agree with that?

A. Most of the damage to his development had already been done. And we know — when we look at the research, we know that the brain actually changes. There are changes made in the brain with the maltreatment of children, including emotional unavailability, emotional neglect, :physical abuse, as well as, domestic .violence that the researchers are showing actual brain changes because of that maltreatment. So that can't be undone.

[RR 43: 256-58.]

44. Applicant asserts that "[h]aving an assaultive. and abusive father-that left him early in life was not a choice that Applicant made," but he does not acknowledge any of the trial testimony about his father, Tony Nelson, that was developed by Ray and Gordon during the punishment phase of the trial. [*See* Application at 36-38.]

45. Witnesses' testimony included information that Applicant's father was an abusive alcoholic who would go to Applicant's mother's house and severely beat her, that Applicant and his siblings witnessed the violence, that Applicant's father was already gone when Applicant was born, and that Applicant's father never spent time with Applicant. [RR 43: 140-44, 149-50, 184, 186, 227.]

46. Applicant's uncle opined that, looking back, the biggest issue with Applicant being able to stay on the straight and narrow was having an "absent father, most likely." [RR 43: 201:]

47. Dr. McGarrahan testified during direct examination about the correlation between acting out in severely aggressive and hostile ways and experiencing emotional unavailability, verbal abuse, physical abuse, and domestic violence. [RR 43: 2461.]

48. Dr. McGarrahan testified that Applicant had a number of risk factors, e.g., ADHD, a mother working two jobs, an absent father, verbal abuse, witnessing domestic violence, "the minority status," and "below SCS status." [RR 43: 253.]

49. Applicant labels mother as an "alcoholic," but he neither, cites nor offers any evidence to support

this characterization. [Application at 37.]

50. Applicant's mother did not drink, smoke, or use drugs during her pregnancy with Applicant; she had a normal pregnancy and delivery, of Applicant; she did not "party" or do drugs; and she was a "hard worker." [State's Exhibit C, Excerpt of Applicant's medical record, attached to the State's Reply to Application for Writ Habeas Corpus; RR 39: 33; RR 43: 144.]

51. Dr. J. Randall Price is a highly, qualified forensic psychologist and neuropsychologist: whom the: State retained at trial and in this habeas proceeding. [*See* State's Exhibit D, Affidavit of J. Randall Price, Ph.D. at 1-2 (hereinafter referred to as "Dr. Price's affidavit"), attached to State's Reply to Application for Writ of Habeas Corpus.]

52. Dr: Price, conducted a forensic psychological evaluation of Applicant on October 12, 2012; reviewed the results of neuropsychological tests administered to Applicant by defense expert Dr. McGarrahan; and attended the entire punishment phase of Applicant's trial. [Dr. Price's affidavit at 2.] In addition, Dr. Price has reviewed the records in this case; the reporter's record of the entire punishment phase of Applicant's trial; a letter dated May 7, 2012, from Dr. Duncan, which is attached to Ray's affidavit; and relevant research, on FAS. [*Id*.]

53. Dr. Price found no evidence that Applicant was exposed to alcohol or any other drug during his mother's pregnancy with him. [Dr. Price's affidavit at 3.]

54. Dr. Price found no evidence that would have given him or Dr. McGarrahan any reason to suspect that Applicant suffered from FAS. [Dr. Price's affidavit at 3.]

55. Applicant's physical facial features, the results of neuropsychological tests administered by Dr. McGarrahan, and the results of an EEG administered when Applicant was about six years old reflected no indication of FAS. [Dr. Price's affidavit at 3.]

56. Applicant's criminal conduct of murdering Clint Dobson and attempting to. murder Judy Elliott was not the result of FAS. [Dr. Price's affidavit at 4.]

57. Applicant's criminal conduct of murdering Dobson and attempting to murder Elliott "was the product of a psychopathic personality disorder characterized by criminal versatility, revocation of conditional release, early behavior problems, a need for stimulation and proneness to boredom, impulsivity, lack of empathy and remorse, manipulativeness, and lack of behavioral control." [Dr. Price's affidavit at 4.]

58. Ray and Gordon called numerous. witnesses whose testimony shed light on Applicant's life history and allowed the jury to decide whether the choices and lifestyles of others during Applicant's childhood affected Applicant as an adult and whether the evidence was sufficiently mitigating to avoid a death sentence.

59. The prevailing professional nouns of practice reflected in the ABA standards are *guides* to

determining what is reasonable.

60. Applicant's, allegations, based on the ABA Guidelines are unsupported and conclusory.

61. Ray and Gordon fully complied with the ABA Guidelines by conducting a thorough mitigation investigation and presenting the best mitigation case they could in light of the evidence and witnesses available to them.

62. Applicant's allegations simply second-guess in hindsight the strategic decisions of Ray and Gordon, who are highly .experienced trial counsel, about how to best present Applicant's mitigation case to the jury.

Conclusions of Law

1. In order to prove a claim of ineffective assistance, an applicant must show by a preponderance of the evidence: (a) deficient performance of trial counsel; and (b) the deficiency prejudiced the defense. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003); *Strickland v. Washington*, 466 U.S. 668, 687 (1984); Perez v. State, 310 S.W.3d 890, 892-93 (Tex. Crim. App. 2010); *Ex parte Briggs*, 187 S.W.3d 458, 466 (Tex. Crim. App. 2005).

2. To establish deficient performance under the first Strickland prong, an applicant must identify the acts, or omissions of counsel that are alleged to constitute ineffective assistance and affirmatively prove that counsel's representation "fell below an objective standard of reasonableness" under prevailing professional norms. *Wiggins*, 539 U.S. at 521; *Ex parte Briggs*, 187 S:W:3d at 466. He

must overcome the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689; *State v. Morales*, 253 S.W.3.d 686, 696. (Tex. Crim. App. 2008); *Ex parte Ellis,* 233 S.W.3d 324, 330 (Tex. Crim. App. 2007).

3. An applicant who succeeds in proving deficient performance must then satisfy the second *Strickland* prong by establishing "a reasonable probability that, but, for counsel's unprofessional errors, the result of the proceeding would have been different." *Ex parte Flores*, 387 S.W.3d 626, 633 (Tex. Crim. App. 2012); *Ex parte Ramirez*, 280 S.W.3d 848, 852 (Tex. Crim. App. 2007) A "reasonable probability" is a "probability sufficient to undermine confidence in the outcome," meaning that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 694. An applicant, must affirmatively prove prejudice, and it is not enough to show that the errors of counsel had some conceivable effect on the outcome. of the proceedings *Id.* at 693, *Ex parte Flores* .387 S.W. 3d at 633.

4. An applicant .bears the burden. to prove that he received ineffective assistance of counsel. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App 1994). Such a claim must be proven by a preponderance of the evidence; *See Bone v. State* 77 S.W.3d 828, 833 (Tex. Crim. App. 2002)

5. An applicant must meet his burden to prove ineffective assistance of counsel with more than unsubstantiated or conclusory statements. *United*

States v. Turcotte, 405 F.3d 515, 537 (7th Cir. 2005). An allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Ex parte Varelas*, 45 S.W.3d 627, 629 (Tex. Crim. App. 2001); *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

6. Reviewing courts must be highly deferential to trial counsel and avoid the deleterious effects of hindsight. *Ex parte Ellis*, 233 S.W.3d at 330. "Both prongs of the. Strickland test are judged by the totality of the circumstances as they existed at trial, not through 20/20 hindsight." *Ex parte Flores*, 387 S.W.3d at 633-34.

7. "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Wiggins*, 539 U.S. at. 521 (quoting *Strickland*, 466 U.S. at 690-91).

8. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Wiggins*, 539 U.S. at 521-22 (quoting *Strickland*, 466 U.S. at 691).

9. Counsel is not required to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. *Wiggins*, 539 U.S. at 533. "[R]easonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." *Rompilla v. Beard*, 545 U.S. 374, 383 (2005).

10. In evaluating an attorney's judgments about whether to pursue evidence courts must consider "whether the known evidence would lead a reasonable attorney to investigate further" and apply a "heavy measure of deference to [an attorney's] judgments" about whether additional evidence might be adduced by further investigation. W*iggins*, 539 U.S. at 527.

11. Counsel's conscious decision not to pursue a defense or to call a witness is not insulated from review, but, unless an applicant overcomes the presumption that counsel's actions were based in sound trial strategy, counsel will generally not be found ineffective. *Ex parte Flores*, 387 S.W.3d at 633.

12. To the extent an investigation revealed that further research would not have been profitable or would not have uncovered useful evidence, counsel's failure to pursue particular lines of investigation may not be deemed unreasonable. *Strickland*, 466 U.S. at 690-91.

13. Though not dispositive, the level of cooperation of the accused with his counsel may be taken into account in assessing whether counsel's

investigation was reasonable. *Ex parte Martinez*, 195 S.W.3d 713, 728-29 (Tex. Crim. App. 2006).

14. The decision whether to call a particular witness is a trial strategy and a prerogative of trial counsel. *See Brown v. State*, 866 S.W.2d 675, 678 (Tex. App.—Houston [1st Dist.] 1993, pet. ref d); *Weisinger v. State*, 775 S.W.2d 424, 427 (Tex. App.—Austin 1989, pet. ref'd).

15. "The mere fact that other witnesses might have been available . . . is not a sufficient ground to prove ineffectiveness of counsel." *Waters v. Thomas*, 46 F.3d 1506, 1514 (11th Cir. 1995). "The test for ineffectiveness is not whether counsel could have done more; perfection is :not required." *Id.* at 1518.

16. Ray and Gordon thoroughly investigated Applicant's background for mitigation purposes and called all of the available witnesses who could provide relevant, beneficial evidence. The actions of Ray and Gordon fall within the wide range of reasonable professional assistance. *See Strickland*, 466 U:S: at 689. *Moore v. Johnson*, 194 F.3d 586, 591-92 (5th Cir. 1999).

17. To obtain relief on an ineffective-assistance claim based on an uncalled witness, an applicant must show that the witness was available to testify and that the testimony would have benefited him. *See Ex parte White*, 160 S.W.3d 46, 52 (Tex. Crim. App. 2004). Ray and Gordon cannot be deemed ineffective for failing to call witnesses who did not want to testify, whose testimony would not have benefitted Applicant's case, or whom they made

reasonable efforts to locate and interview without success.

18. This Court cannot presume that there were available witnesses whose testimony would have benefitted Applicant. *See Tutt v. State*, 339 S.W.3d 166, 171 (Tex. App.—Texarkana 2011, pet. ref'd).

19. Ray and Gordon conducted a reasonable and thorough investigation, made every effort to locate witnesses whose testimony might benefit Applicant's mitigation case, and called those witnesses who were willing to testify and who were helpful to Applicant's case. [Ray's affidavit at 2-6; "People List" attached to Ray's affidavit; Gordon's affidavit at 2.]

20. Ray and Gordon were not required to process the evidence offered in mitigation into a particular format. *Cf. Ex parte LaHood*, 401 S.W.3d at 50 ("no set of detailed rules can completely dictate how to best represent a criminal defendant").

21. Ray and Gordon made a well-reasoned strategic decision based on a thorough investigation, their professional judgment, the available witness testimony, and their reliance on well-qualified experts about how to best present Applicant's case to the jury. *See Miller v. Lynaugh*, 810 F.2d 1403, 1410 (5th Cir. 1987) ("the presentation of witness, testimony is essentially strategy and thus within the trial counsel's domain") (quoting *Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir. 1985)).

22. Applicant's complaint constitutes an impermissible second-guessing of the manner in which his experienced trial counsel chose to

present Applicant's mitigation case at trial. Such arguments do not support an allegation of ineffective assistance. *See Strickland*, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight"); *Ex Parte Flores*,. 387 S.W.3d at 633-34 ("Both prongs of the Strickland test are judged by the, totality of .the circumstances as they existed at trial, not through 20/20 hindsight"); *Ex parte Ellis*, 233. S.W.3d at 330 (reviewing courts must be highly deferential to trial counsel and avoid deleterious effects of hindsight).

23. "The fact that another attorney may have pursued a different tactic at trial is insufficient to prove a claim of ineffective assistance." *Scheanette v. State*, 144 S.W.3d 503, 510 (Tex. Crim. App. 2004).

24. Applicant has failed to meet his burden to prove by a preponderance of the evidence that the performance of Ray and Gordon in investigating and presenting Applicant's mitigation case fell below an objective standard of reasonableness under prevailing professional norms. Applicant has not overcome the strong presumption that the conduct of Ray and Gordon fell within the wide range of reasonable professional assistance. Applicant's claims are not firmly founded in the record, and Applicant has failed to establish deficient performance on the part of Ray and Gordon.

25. Applicant's conclusory allegations of prejudice fail to meet his burden to establish by a preponderance of the evidence a reasonable probability that the

jury would have answered the mitigation special issue differently had Ray and Gordon done everything Applicant alleges they should have. *See Ex parte Medina*, 361 S.W.3d 633, 644 (Tex. Crim. App. 2011) (proving prejudice "mandates a fact-intensive and exhaustive review of the proceedings as a whole"; because an applicant bears the burden, "the courts are, not responsible for delving into the record, investigating the case, and then formulating a habeas applicant's claims").

26. There is no reasonable probability that the jury would have answered the mitigation special issue differently had Ray and Gordon done everything Applicant alleges they should have. The alleged deficiencies of Ray and Gordon, even if they occurred, were not so serious as to deprive Applicant of a fair trial whose result is reliable. Applicant's claims are, not firmly founded in the record, and Applicant has not met his burden to establish by a preponderance of the evidence that he suffered any prejudice as a result of the alleged deficient performance of Ray and Gordon.

27. The Court recommends that Applicant's first claim for relief be denied.

B.

CLAIM TWO

Applicant contends that mitigating evidence must reduce "moral blameworthiness" violates the Eighth Amendment by precluding consideration of evidence regarding a defendant's character and background that a juror could find to be mitigating by limiting the

scope of mitigating evidence available to the jury. [Application at 41-49.]

Findings of Fact

1. The Court's mitigation special issue in this case complied with the requirements of TEX. CODE CRIM. PROC. art. 37.071, § 2(e) and (f). [CR 2: 413.]
2. The Court's charge included the statutory definition that mitigating evidence is "evidence that a juror might regard as reducing the defendant's moral blameworthiness." [CR 2: 413.] TEX. CODE CRIM. PROC. art. 37.071, § 2(f)(4).

Conclusions of Law

1. The statutory mitigation special issue does not unconstitutionally narrow the jury's discretion to factors concerning only moral blameworthiness. *See Coble v. State*, 330 S.W.3d 253, 296 (Tex. Crim. App. 2010); *Roberts v. State*, 220 S.W.3d 521, 534 (Tex. Crim. App. 2007); *Perry v. State*, 158 S.W.3d 438, 449 (Tex. Crim. App. 2004).
2. The Court's mitigation instructions did not force the jury to disregard Applicant's allegedly mitigating evidence. *See Roberts*, 220 S.W.3d at 534.
3. Applicant presents no valid basis to reconsider the prior decisions of the Court of Criminal Appeals rejecting his claim.
4. The Court recommends that Applicant's second claim for relief be denied.

C.

CLAIM THREE

Applicant contends that his rights under the Fifth and Fourteenth and Amendments were violated by the failure of Texas law to require grand juries to pass on the death-penalty-eligibility factors in this case. [Application at 50-53.]

Findings of Fact

5. The grand jury did not pass on the punishment special issues when it voted to indict Applicant for capital murder in cause number 1232507D. [CR 1: 12.]

6. Applicant's capital-murder indictment handed down by the grand jury in cause number 1232507D does not include the punishment special issues. [CR 1: 12.]

Conclusions of Law

1. The grand jury is not required to pass on the punishment special issues when deciding whether to indict a defendant for capital murder. *See Estrada v. State*, 313 S.W.3d 274, 307 (Tex. Crim. App. 2010); *Roberts v. State*, 220 S.W.3d 521, 535 (Tex. Crim. App. 2007); *Renteria v. State*, 206 S.W.3d 689, 709 (Tex. Crim. App. 2006); *Rayford v. State*, 125 S.W.3d 521, 533-34 (Tex. Crim. App. 2003).

2. Applicant presents no valid basis to reconsider the prior decisions of the Court of Criminal Appeals rejecting his claim.

3. The Court recommends that Applicant's third

claim for relief be denied.

D.

CLAIM FOUR

Applicant alleges that his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments, were, violated because the Texas death-penalty scheme does not place the burden of proof on the State on the mitigation special issue. [Application at 54-59.]

Findings of Fact

1. Applicant relies mainly on the *Apprendi-Ring-Blakeley* line of cases. *See Blakely v. Washington*, 542 U.S. 296 (2004); *Ring v. Arizona*, 536 U.S. 584 (2002); *Apprendi v. New Jersey*, 530 U:S. 466 (2002).
2. The Court's jury charge included the statutory mitigation special issue required by TEX. CODE CRIM. PROC. art. 37.071, § 2(e) and (f). [CR 2: 413.]
3. The Court's mitigation special issue did not place the burden of proof on the State [CR 2: 413.]

Conclusions of Law

1. The mitigation special issue is a defensive issue in which the State has no burden of proof. *Williams v. State*, 273 S.W.3d 200, 221-22 (Tex. Crim. App. 2008).
2. There is no constitutional violation in failing to place the burden of proof on the State with regard to the mitigation special issue. *Busby v. State*, 253 S.W.3d 661, 667 (Tex. Grim. App. 2008); *Woods v. State*, 152 S.W.3d 105, 119-21 (Tex. Crim. App. 2004); *Escamilla v. State*, 143 S.W.3d 814, 828

(Tex. Crim. App. 2004); *Rayford v. State*, 125 S.W.3d 521, 533-34 (Tex. Crim. App. 2003).

3. Applicant presents no valid basis to reconsider the prior decisions of the Court of Criminal Appeals rejecting his claim.

4. The Court recommends that Applicant's fourth claim for relief be denied.

E.

CLAIM FIVE

Applicant asserts that his Fourteenth Amendment due-process right: to be free from a wholly arbitrary deprivation of liberty and Eighth Amendment right to be free from the arbitrary and capricious infliction of the death penalty were violated because the evidence adduced at trial was legally insufficient to support the jury's answer to the future-dangerousness special issue. [Application at 60-62.]

Findings of Fact

1. Applicant raised a point of error on direct appeal challenging the legal sufficiency of the evidence to support the jury's finding of future-dangerousness.

2. The favorable evidence introduced at the guilt-innocence and punishment phases of Applicant's trial overwhelmingly supported the jury's affirmative finding on the future-dangerousness special issue.

3. In light of the overwhelming aggravating evidence presented during the guilt-innocence and punishment phases of Applicant's trial, a negative

answer to the future-dangerousness special issue would have been irrational.

Conclusions of Law

1. Applicant's claim, which was raised on direct appeal, is not cognizable in this habeas proceeding. *See Ex parte Buck*, 418 S.W.3d 98, 102 (Tex. Crim. App. 2013); *Ex parte Brown*, 205 S.W.3d 538, 546 (Tex. Crim. App. 2006).

2. Even if Applicant's claim were cognizable in this habeas proceeding, the evidence is legally sufficient to support the jury's affirmative finding on the future-dangerousness special issue. *See, e.g., Williams v. State*, 270 S.W.3d 112, 138-39 (Tex. Crim. App. 2008); *Mathis v. State*, 67 S.W.3d 918, 922 Tex. Crim. App. 2002); *Brooks v. State*, 990 S.W.2d 278, 284-85 (Tex. Crim. App. 1999); *Allridge v. State*, 850 S.W.2d 471, 488-89 (Tex. Crim. App. 1991).

3. The Court recommends that Applicant's fifth claim for relief be denied.

F.

CLAIM SIX

Applicant asserts that his Fourteenth Amendment right to due process and Eighth Amendment: right to be free from the arbitrary and capricious infliction of the death penalty were violated because the statute under which Applicant was sentenced to death allows the jury too much discretion to determine who should live and who should die and it lacks the minimal standards and guidance necessary for the jury to avoid the arbitrary and capricious imposition of the

death penalty. [Application at 63-65.]

Findings of Fact

1. Texas' death-penalty statute under which Applicant was sentenced does not allow the jury too much discretion to determine who should live and who should die.

2. Texas' death-penalty statute does not lack the minimal standards and guidance necessary for the jury to avoid the arbitrary and capricious infliction of the death penalty.

Conclusions of Law

1. Texas' death-penalty scheme does not violate Applicant's constitutional right to be free from the arbitrary and capricious infliction of the death penalty by allowing the jury too much discretion to determine who should live and who should die. *See Busby v. State*, 253 S.W.3d 661, 667 (Tex. Crim. App. 2008); *Salclano v. State*, 232 S.W.3d 77, 107-08 (Tex. Crim. App. 2007); *Woods v. State*, 152 S.W.3d 105, 121 & n.66 (Tex. Crim. App. 2004).

2. Applicant presents no valid basis to reconsider the prior decisions of the Court of Criminal Appeals rejecting his claim.

3. The Court recommends that Applicant's sixth claim for relief be denied.

G.

CLAIM SEVEN

Applicant alleges that his Fourteenth Amendment right to due process and Eighth Amendment rights as interpreted in *Penry v. Johnson*, 532 U.S. 782 (2001)

(*Penry II*), were violated because the mitigation special issue set forth in the Texas death-penalty statute sends mixed signals to the jury, thereby rendering any verdict reached in response to that special issue intolerably unreliable. [Application at 66-69.]

Findings of Fact

1. The Court's jury charge contained the statutory mitigation special issue required by TEX. CODE CRIM. PROC. art. 37.071, § 2(e) and (f). [CR 2: 413.]
2. The mitigation special issue does not contain a nullification instruction. [CR 2: 413.]

Conclusions of Law

1. "*Penry II* is distinguishable because, in that case, the jury was given a judicially crafted nullification instruction." *Coble v. State*, 330 S.W.3d 253, 297 (Tex. Crim. App. 2010) (footnote omitted) (citing *Penry*, 532 U.S. at 797-99).
2. The Court of Criminal Appeals has repeatedly rejected Applicant's current claim. *See Coble*, 330 S.W.3d at 297.
3. Applicant presents no valid basis to reconsider the prior decisions of the Court of Criminal Appeals rejecting his claim.
4. The Court recommends that Applicant's seventh claim for relief be denied.

H.

CLAIM EIGHT

Applicant alleges that his rights under the Eighth

and Fourteenth Amendments were violated because the Texas death-penalty scheme fails to require the jury to consider mitigation in answering the mitigation special issue. [Application at 70.] He alleges that "[j]urors in a capital case in Texas should be required to consider mitigating evidence, not simply to consider whether there is sufficient. mitigating evidence to warrant a life sentence." [*Id.*]

Findings of Fact

1. The Court's jury charge included the statutory mitigation special issue required by TEX. CODE CRIM. PROC. art. 37.071, § 2(e) and (f). [CR 2: 413.]
2. The statutory mitigation special issue allows jurors to individually determine what evidence, if any, is mitigating.
3. The Court's mitigation special issue directed "consideration of all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant." [CR 2: 413.] *See* TEX. CODE CRIM. PROC. art. 37.071, § 2(e)(1).

Conclusions of Law

1. The constitution requires jurors to be given a vehicle by which they can give effect to mitigating evidence. *Threadgill v. State*, 146. S.W.3d 654, 671 (Tex. Crim. App. 2004).
2. Jurors must individually determine what evidence, if any, is mitigating. *Threadgill*, 146 S.W.3d at 671.
3. The Court of Criminal Appeals, has rejected

complaints identical to Applicant's. current assertions. *See Whitaker v. State*, 286 S.W.3d 355, 369 (Tex. Crim. App. 2009); *Busby v. State*, 253 S.W.3d 661, 667 (Tex. Crim. App. 2008); *Threadgill*, 146 S.W.3d at 671.

4. Applicant presents no valid basis to reconsider the prior decisions of the Court of Criminal Appeals rejecting his claim.

5. The Court recommends that Applicant's eighth claim be denied.

I.

CLAIM NINE

Applicant alleges that his rights under the Eighth and Fourteenth Amendments were violated because the Texas death-penalty scheme fails to adequately define "mitigating circumstances:" [Application at 71.]

Findings of Fact

1. The Court's jury charge included the statutory mitigation special issue required by TEX. CODE CRIM. PROC. art. 37.071, § 2(e) and (f). [CR 2: 413.]

2. The Court's mitigation special issue instructed the jury about the nature of evidence it should consider in answering the issue. [CR 2: 413.]

3. The Court's mitigation special issue directed "consideration of all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant." [CR 2: 413.] *See* TEX. CODE CRIM. PROC. art. 37.071, § 2(e)(1).

Conclusions of Law

1. "[T]he mitigation issue is in reality a normative determination left to the subjective conscience of, each juror." *Howard v., State*, 941 S.W.2d 102, 119 (Tex. Crim. App. 1996).

2. Each juror must decide what mitigating weight, if any, to give to particular evidence. *Curry v. State*, 910 S.W.2d 490, 494(Tex. Crim. App. 1995).

3. The failure to further define "mitigating circumstances" or "mitigating evidence" did not render the statutory mitigation special issue unconstitutional, as the terms could be understood by the jury without a special instruction. *See Feldman v. State*, 71 S.W.3d 738, 757 (Tex. Crim. App. 2002); *Ladd v. State*, 3 S.W.3d 547, 572-73 (Tex. Crim. App. 1999).

4. Applicant presents no valid basis to reconsider the prior decisions of the Court of Criminal Appeals rejecting his claim.

5. The Court recommends that Applicant's ninth claim for relief be denied.

J.

CLAIM TEN

Applicant alleges that he received ineffective assistance when his .trial counsel failed to object to excessive and prejudicial security measures, adopted by the Court, which were not justified by any essential State interest specific to Applicant, in violation of Applicant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. [Application at 72-74.]

Findings of Fact

1. During jury selection and trial, Applicant carried with him razor blades and other contraband either in the Tarrant County Jail or on his way to court. [Gordon's affidavit at 3.]
2. Applicant had numerous violent episodes in the Tarrant County Jail toward both persons and property. [Ray's affidavit at 6.]
3. Immediately after the punishment verdict, Applicant intentionally broke the fire sprinkler system in the Court's holdover cell and flooded the courtroom. [Ray's affidavit at 6.]
4. Applicant's behavior created a great deal of concern about Applicant and his ability to do harm to others in the courtroom during the trial proceedings. [Gordon's affidavit at 3.]
5. Applicant's behavior created a situation of heightened security of Applicant and his actions. [Gordon's affidavit at 3.]
6. The additional security measures that. were taken to assure the safety of others in the courtroom, were not visible to the jury. [Gordon's affidavit at 3.]
7. It was not, obvious that Applicant wore a shock band during the trial proceedings. [Ray's affidavit at 6.]
8. The jury never saw that Applicant was restrained in any manner during his trial [*See* Gordon's affidavit at 3; Ray's affidavit at 6.]
9. Neither the Court nor the parties ever gave the

jury any indication that Applicant was restrained. [Ray's affidavit at 6.]

10. Any deputies who stood near the defense's table in the courtroom maintained a sufficient, distance in order to allow Applicant's trial counsel to do the work necessary to defend Applicant. [Gordon's affidavit at 3.]

11. Applicant offers nothing beyond conclusory allegations that any restraint imposed affected his defense during any proceeding or portion of his trial in this cause. [*See* Application at 72-74.]

Conclusions of Law

1. In order to prove a claim of ineffective assistance, an applicant must show by a preponderance of the evidence: (a) deficient performance of trial counsel; and (b) the deficiency prejudiced the defense. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003); *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Perez v. State*, 310 S.W.3d 890, 892-93 (Tex. Crim. App. 2010); *Ex parte Briggs*, 187 S.W.3d 458, 466 (Tex. Crim. App. 2005).

2. To establish deficient performance under the first *Strickland* prong, an applicant must, identify the acts or omissions of counsel that are alleged to constitute ineffective assistance and affirmatively prove that counsel's representation "fell below an objective standard of reasonableness" under prevailing, professional nouns. *Wiggins*, 539 U.S. at 521; *Ex parte Briggs*, 187 S.W.3d at 466. He must overcome the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland*,

466 U.S. at 680; *State v Morales*, 253 S.W.3d 686, 696 (Tex. Crim. App. 2008); *Ex parte Ellis*, 233 S.W.3d 324 330 (Tex. Crim. App. 2007).

3. An applicant who succeeds in proving deficient performance must then satisfy the second *Strickland* prong by establishing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Ex parte Flores*, 387 S.W.3d 626, 633 (Tex. Crim. App. 2012); *Ex parte Ramirez*, 280 S.W.3d 848, 852 (Tex. Crim. App. 2007). A "reasonable probability" is a "probability sufficient to undermine confidence in the outcome," meaning that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 694. An applicant must affirmatively prove prejudice, and it is not enough to show that the errors counsel had some conceivable effect on the outcome of the proceedings. *Id.* at 693; *Ex parte Flores*, 387 S.W.3d at 633.

4. An applicant bears the burden to prove that he received ineffective assistance of counsel. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). Such a claim must be proven by a preponderance of the evidence. *See Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002).

5. An applicant must meet his burden to prove ineffective assistance of counsel with more than unsubstantiated or conclusory statements. *United States v. Turcotte*, 405 F.3d 515, 537 (7th Cir. 2005). An allegation of ineffectiveness must be firmly founded in the record, and the record must

affirmatively demonstrate the alleged ineffectiveness. *Ex parte Varelas*, 45 S.W.3d 627, 629 (Tex. Crim: App. 2001); *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

6. Reviewing courts must be highly deferential to trial counsel and avoid the deleterious effects of hindsight. *Ex parte Ellis*, 233 S.W.3d at 330. "Both prongs of the *Strickland* test are judged by the totality of the circumstances as they existed at trial, not through 20/20 hindsight." *Ex parte Flores*, 387 S.W.3d at 633-34.

7. Applicant's conclusory allegations are insufficient to sustain his burden to prove by a preponderance of the evidence that any of the reasonable restraints imposed affected his defense during either phase of his trial. *See Turcotte*, 405 F.3d at 537 (ineffective-assistance claim must be proven with more than unsubstantiated or conclusory statements); *Scheanette v State*, 144 S.W.3d 503, 510 (Tex. Crim. App. 2004) (ineffective-assistance claims are not built on retrospective speculation; rather, they must be "firmly founded in the record").

8. Under the circumstances presented here — the Court's need to protect the safety of persons in the courtroom and the use of reasonable restraints that were not visible to the jury and that did not interfere with Applicant's legal representation during trial — it cannot be said that the failure of Ray and Gordon to object "fell below an objective standard of reasonableness" under prevailing professional norms. Applicant fails to meet his burden to prove by a preponderance of the

evidence that Ray and Gordon were deficient in not objecting to the reasonable restraints used during Applicant's trial.

9. Under the circumstances presented here — the Court's need to protect the safety of persons in the courtroom and the use of reasonable restraints that were not visible to the jury and that did not interfere with Applicant's legal representation during trial — there is no reasonable probability that, but for the failure of Ray and Gordon to object to the reasonable restraints used during Applicant's trial, the outcome of either phase of the trial would have been different. Applicant fails to meet his burden to prove by a preponderance of the evidence that any deficiencies of Ray and Gordon resulted in prejudice.

10. The Court recommends that Applicant's tenth claim for relief be denied.

K.

CLAIM ELEVEN

Applicant alleges that the "10-12" rule in TEX. CODE CRIM. PROC. art. 37.071, § 2(d) and (f)(2) is unconstitutional because it creates an impermissible risk of the arbitrary imposition of the death penalty in violation of the Fifth, Eighth, and Fourteenth Amendments. [Application at 75-81.]

Findings of Fact

1. Applicant challenged the constitutionality of the "10.-12" rule on direct appeal.

2. The Court's mitigation special issue complied,

with the requirements of TEX. CODE CRIM. PROC. art. 37.071, § 2(e) and (f). [CR 2: 413.]

3. The Court did not instruct the jury that a hold-out vote by one juror would result in a life sentence.

Conclusions of Law

1. Applicant's complaint, which was raised on direct appeal, is not cognizable in this habeas proceeding. *See Ex parte Buck*, 418 S.W.3d 98, 102 (Tex. Crim. App. 2013); *Ex parte Brawn*, 205 S.W.3d 538, 546 (Tex. Crim. App. 2006).

2. This Court was prohibited by TEX. CODE CRIM. PROC. art. 37.071, § 2(a)(1) from instructing any. juror or prospective juror of the effect of a failure of the jury to agree on the mitigation special issue.

3. There is no constitutional violation in failing to inform jurors of the effect of their failure to agree on special issues. *E.g., Leeza v. State*, 351 S.W.3d 344, 361-62 (Tex. Crim. App. 2011); *Mays v. State*, 318 S.W.3d 368, 397 (Tex. Crim. App. 2011); *Williams v. State*, 301 S.W.3d 675, 694 (Tex. Crim. App. 2009); *Luna v. State*, 268 S.W.3d 594, 609 (Tex. Crim. App. 2008); *Busby v. State*, 253 S.W.3d 661, 667 (Tex. Crim. App. 2008); *Druery v. State*, 225 S.W.3d 491, 509 (Tex. Crim. App. 2007); *Russeau v. State*, 171 S.W.3d 871, 886 (Tex. Crim. App. 2005).

4. Applicant presents no valid basis to reconsider. the prior decisions of the Court of Criminal Appeals rejecting his claim.

5. The Court recommends that Applicant's eleventh claim for relief be denied.

L.

CLAIM TWELVE

Applicant alleges that TEX. CODE CRIM. PROC. art. 37.071, § 2(a) is unconstitutional and violates the Fifth, Eighth, and Fourteenth Amendments because it specifically states that no one may inform the jury of the result of its inability to agree the answer to any issues submitted to them. [Application at 82-84.]

Findings of Fact

1. Applicant raised a complaint similar to his current complaint on direct appeal when he alleged that the Court erred in refusing to instruct the jury that Applicant would receive a life sentence by operation of law if a single juror held out for life.
2. The Court did not inform the jurors of the effect of their failure to agree on the special issues.

Conclusions of Law

1. Applicant's current complaint, which was raised on direct appeal, is not cognizable in this post-conviction habeas proceeding. *See Ex parte Buck*, 418 S.W.3d 98, 102 (Tex. Crim. App. 2013); *Ex parte Brown*, 205 S.W.3d 538, 546 (Tex. Crim. App. 2006).
2. The trial court, the State, the defendant, and the defendant's attorney may not inform a juror or prospective juror of the effect of a jury to agree on the special issues. TEX. CODE CRIM. PROC. art. 37.071 § 2(a)(1).
3. There is no constitutional violation in failing to inform jurors of the effect of their failure, to agree

on special issues. *See Druery v. State*, 225 S.W.3d 491, 509 (Tex. Crim. App. 2007); *Russeau v. State*, 171 S.W.3d 871, 886 (Tex. Crim. App. 2005).

4. Applicant presents no valid basis to reconsider the prior decisions of the Court of Criminal Appeals, rejecting his claim.

5. The Court recommends that Applicant's twelfth claim for relief be denied.

M.

CLAIM THIRTEEN

Applicant asserts that TEX. CODE CRIM. PROC. art. 37.071 is unconstitutional because it fails to place the burden of proof on the State regarding aggravating evidence. [Application at 85-88.]

Findings of Fact

1. Applicant raised, his current complaint in point of error twelve on direct appeal.

2. The Court's jury charge included the statutory mitigation special issue required by TEX. CODE CRIM. PROC. § 2(e) and (f) [CR 2: 413.]

3. The Court's mitigation special issue did not place the burden of proof on the State. [CR 2: 413.]

Conclusions of Law

1. Applicant's current contention, which was raised on direct appeal, is not cognizable in this habeas proceeding. *See Ex parte Buck*, 418 S.W.3d 98, 102 (Tex. Crim. App. 2013); *Ex parte Brown*, 205 S.W.3d 538, 546 (Tex. Crim. App. 2006).

2. The mitigation special issue is a defensive issue in

which the State has no burden of proof. *Smith v. State*, 297 S.W.3d 260, 277-78 (Tex. Crim. App. 2009); *Williams v. State*, 273 S.W.3d 200, 221-22 (Tex. Crim. App. 2008).

3. The Court of Criminal Appeals has rejected Applicant's arguments. *See Luna v. State*, 268 S.W.3d 594, 609 (Tex. Crim. App. 2008); *Busby v. State*, 253 S.W.3d 661, 667 (Tex. Crim. App. 2008); *Escamilla v. State*, 143 S.W.3d 814, 828 (Tex. Crim. App. 2004); *Rayford v. State*, 125 S.W.3d 521, 533-34 (Tex. Crim. App. 2004).

4. Applicant presents no valid basis to reconsider the prior decisions of the Court of Criminal Appeals rejecting his claim.

5. The Court recommends that Applicant's thirteenth claim for relief be denied.

N.

CLAIMS FOURTEEN THROUGH SEVENTEEN

Applicant alleges that the imposition of a death sentence in this case constitutes cruel or unusual punishment and violates his right to due process under the federal and state constitutions because he has permanent brain damage resulting from Fetal Alcohol Syndrome ("FAS"). [Application at 89-104.] He further states that he received ineffective assistance of counsel when his trial counsel failed to investigate his disease of FAS and how it affects him. [*Id.* at 89-90.]

Findings of Fact

1. Applicant relies on *Atkins v. Virginia*, 536 U.S. 304

(2002), which held that the Eighth Amendment's ban on excessive and cruel and unusual punishment prohibited the execution of individuals with intellectual disability.[1]

2. Applicant's claim for relief is not based on intellectual disability as was the claim in *Atkins*.

3. Applicant offers no persuasive argument that *Atkins* should extend to require a blanket exemption from the death penalty for persons suffering from FAS.

4. Contrary to Applicant's assertions, no trial witness testified that Applicant's mother drank excessively or used mind-altering substances while she was pregnant with Applicant or that Applicant's upbringing was difficult because his mother was addicted to alcohol, paint sniffing, and other drugs. [*See* Application at 92.]

5. There is no evidence in the trial or habeas record to support Applicant's assertions that his mother used alcohol or drugs while she was pregnant with Applicant or at any other time. [*See* Application at 90-104]

6. Dr. McGarrahan never testified that Applicant suffered any type of mental difficulty resulting from FAS. [*See* Application at 92.]

7. Applicant's mother did not drink, smoke, or use drugs during her pregnancy with Applicant; she

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[1] Although, the term "mental retardation" has been employed in, the past, the Supreme Court of the United States now favors use of the term "'intellectual disability' to describe the identical phenomenon." *Hall v. Florida*, 134 S. Ct. 1986; 1990 (2014).

had a normal pregnancy and delivery of Applicant; she did not "party" or do drugs; and she was a "hard worker." [*See* State's Exhibit C, Excerpt of Applicant's medical record, attached to State's Reply to Application for Writ of Habeas Corpus; RR 39: 33; RR 43: 144.]

8. Applicant presents no evidence or expert opinion that he suffers from FAS. [*See* Application at 90-104.]

9. At trial and in this habeas proceeding, the State retained Dr. Price, a highly qualified, forensic psychologist and neuropsychologist. [See Dr. Price's affidavit, at 1-2.]

10. Dr. Price conducted a forensic psychological evaluation of Applicant on October 12, 2012; reviewed the results of a neuropsychological tests administered to Applicant by defense expert Dr. McGarrahan; and attended the entire punishment phase of Applicant's trial. [Dr. Price's affidavit at 2.]

11. Dr. Price has reviewed the records in this case; the reporter's record of the entire punishment phase of Applicant's trial; a letter dated May 7, 2012, from James E. Duncan, M.D., which is attached to Ray's affidavit; and relevant research on FAS. [Dr. Price's affidavit at 2.]

12. Dr. Price found no evidence that Applicant was exposed to alcohol or any other drug during his mother's pregnancy with him. [Dr. Price's affidavit at 3.]

13. Dr. Price found no evidence that would have given

him or Dr. McGarrahan any reason to suspect that Applicant suffered from FAS. [Dr. Price's affidavit at 3.]

14. Applicant's physical facial features, the results of neuropsychological tests administered by Dr. McGarrahan, and the results of an EEG administered when Applicant was about six years old reflected no indication of FAS. [Dr. Price's affidavit at 3.]

15. Applicant's criminal conduct of murdering Clint Dobson and attempting to murder Judy Elliott was not the result of. FAS. [Dr. Price's affidavit at 4.]

16. Applicant's criminal conduct of murdering Clint Dobson and attempting to Murder Judy Elliott "was the product of a psychopathic personality disorder characterized by criminal versatility, revocation of conditional release, early behavior problems, a need for stimulation and proneness to boredom, impulsivity; lack of empathy and remorse, manipulativeness, and lack of behavioral control." [Dr. Price's affidavit at 4.]

17. Even assuming, *arguendo*, that Applicant could prove that he suffers from FAS, such condition would not exempt him from facing the death penalty.

18. Although Applicant's claims for relief state that Ray and Gordon were ineffective because they "failed to investigate [Applicant's] disease of fetal alcohol syndrome and how it affects him," Applicant never discusses these allegations or provides any evidence or argument to support

them. [Application at 89-104 (discussing only Applicant's complaints that death sentence violates due process or constitutes cruel and/or unusual punishment under federal and state constitutions).]

19. Ray and Gordon met numerous times with Applicant; gathered his available medical records; interviewed witnesses who were willing to cooperate; had Applicant's records reviewed by medical personnel; and had Applicant evaluated by Dr. McGarrahan, who is a highly experienced forensic psychologist and neuropsychologist. [Ray's affidavit at 2-5; Letter of Dr. Duncan attached to Ray's affidavit; Gordon's affidavit at 2-3.]

20. There is no evidence that Applicant was exposed to alcohol or any other drug while his mother was pregnant with him. [Dr. Price's affidavit at 3.]

21. Ray and Gordon obtained a report from Dr. Duncan, who noted that Applicant had a normal EEG as a child and that he found no evidence of a seizure disorder. [Ray's affidavit at 6; Letter of Dr. Duncan attached to Ray's affidavit.]

22. Research literature on FAS indicates that EEG abnormalities are present in children exposed to alcohol *in utero*. [Dr. Price's affidavit at 3.]

23. The EEG indicator of FAS was not present in Applicant's case. [Dr Price's affidavit at 3.]

24. There was no reason that either Dr. McGarrahan or Dr. Price would have suspected that Applicant suffered from FAS. [Dr. Price's affidavit at 3-4.]

25. Dr. Price opines that Applicant does *not* suffer from FAS, and Applicant has provided no contrary evidence. [Dr. Price's affidavit at 3-4; Application at 89-104.]

26. The thorough investigation conducted by Ray and Gordon turned up nothing to indicate that Applicant might have FAS.

27. The jury would have rejected any attempt by Ray and Gordon to prove that Applicant suffered from FAS in light of the absence of any evidence that Applicant was exposed to alcohol or any other drug during his mother's pregnancy with him and the absence of any diagnosis by a qualified expert.

28. Evidence that Applicant suffered from FAS would necessarily have been double-edged in nature and would have served to :further- strengthen .the State's overwhelming proof of Applicant's future dangerousness.

Conclusions of Law

1. Applicant's reliance on *Atkins v. Virginia*, 536 U.S. 304 (2002), is misplaced because the *Atkins* Court expressly limited its holding to those with intellectual disability. *Id*. at 320.

2. The Court of Criminal Appeals has rejected an argument that the rule or rationale of *Atkins* extends to exempt persons with mental illness, including FAS, from imposition of the death penalty. See *Soliz v. State*, 432 S.W.3d 895, 903-04 (Tex. Crim. App. 2014) (Soliz not exempt from death penalty despite expert testimony that Soliz was diagnosed with partial FAS and had cognitive

and functional abilities similar to person with intellectual disability); *Mays v. State*, 318 S.W.3d 368, 379 (Tex. Crim. App. 2010).

3. Applicant would have been eligible for the death penalty even if he had been diagnosed with FAS. *See Soliz*, 432 S.W.3d at 903-04; *Mays*, 318 S.W.3d at 379.

4. In order to prove a claim of ineffective assistance, an applicant must show by a preponderance of the evidence: (a) deficient performance of trial counsel; and (b) the deficiency prejudiced the defense. *Wiggins v Smith*, 539 U.S. 510, 52.1 (2003); *Strickland v Washington*, 466 U.S. 668, 687 (1984); *Perez v. State*, 310 S.W.3d 890, 892-93 (Tex. Crim. App. 2010); *Ex parte Briggs*, 187 S.W.3d 458, 466 (Tex. Crim. App. 2005).

5. To establish deficient performance, under the first *Strickland* prong, an applicant must identify the acts or omissions of counsel that are alleged to constitute, ineffective assistance and affirmatively prove that counsel's representation "fell below an objective standard of reasonableness" under prevailing professional norms. *Wiggins*, 539 U:S. at 521; *Ex parte Briggs*, 187 S.W.3d at 466. He must overcome the strong presumption that Counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689; *State v. Morales*, 253 S.W.3d 686, 696 (Tex. Crim. App. 2008); *Ex parte Ellis*, 233 S.W.3d 324, 330 (Tex. Crim App. 2007).

6. An applicant who succeeds in proving deficient performance must then satisfy the. second

Strickland prong by establishing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Ex parte Flores*, 387 S.W.3d 626, 633 (Tex. Crim. App. 2012); *Ex parte Ramirez*, 280 S.W.3d 848, 852 (Tex. Crim. App. 2007). A "reasonable probability" is a "probability sufficient to undermine confidence in the outcome," meaning that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 694. An applicant must affirmatively prove prejudice, and it is not enough to show that the errors of counsel had some conceivable effect on the outcome of the proceedings. *Id*. at 693; *Ex parte Flores*, 387 S.W.3d at 633.

7. An applicant bears the burden to prove that he received ineffective assistance of counsel. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). Such a claim must be proven by a preponderance of the evidence. *See Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002).

8. An applicant must meet his burden to prove ineffective assistance of counsel with more than unsubstantiated or conclusory statements. *United States v. Turcotte*, 405 F.3d 515, 537 (7th. Cir. 2005). An allegation of ineffectiveness must be firmly founded in, the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Ex parte Varelas*, 45 S.W.3d 627, 629 (Tex. Crim. App. 2001); *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999):

9. Reviewing courts must be highly deferential to

trial counsel and avoid the deleterious effects of hindsight. *Ex parte Ellis*, 233 S.W.3d at 330. "Both prongs of the Strickland test are judged by the totality of the circumstances as they existed at trial, not through 20/20 hindsight." *Ex parte Flores*, 387 S.W.3d at 633-34.

10. "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable, professional judgments support the limitations on investigation." *Wiggins*, 539 U.S. at 521 (quoting *Strickland* 466 U.S. at 690-91).

11. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case; a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Wiggins*, 539 U.S. at 521-22 (quoting *Strickland*, 466 U.S. at 691).

12. Counsel is not required to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. *Wiggins*, 539 U.S. at 533. "[R]easonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." *Rompilla v. Beard*, 545 U.S. 374, 383 (2005).

13. In evaluating an attorney's judgments about whether to pursue evidence, courts must consider "whether the known evidence would lead a reasonable attorney to investigate further" and apply a "heavy measure of deference to [an attorney's] judgments" about whether additional evidence might be adduced by further. investigation. *Wiggins*, 539 U.S. at 527.

14. Counsel's conscious decision not to pursue a defense or to call a witness is not insulated from review, but, unless an applicant overcomes the presumption that counsel's actions were based in sound trial strategy, counsel will generally not be found ineffective. *Ex parte Flores*, 387 S.W.3d at 633.

15. To the extent an investigation revealed that further research would not have been profitable or would not have uncovered useful evidence, counsel's failure to pursue particular lines of investigation may not be deemed unreasonable. *Strickland*, 466 U.S. at 690-91.

16. Under the. circumstances presented here, Ray and Gordon cannot be deemed to have been deficient for not investigating or presenting evidence of FAS when nothing during their thorough investigation put them on notice that such a condition existed or might exist. *See Garza v. Stephens*, 738 F.3d 669, 681 (5th Cir. 2013) (counsel's failure to investigate and introduce evidence of possible FAS not ineffective where no evidence underlying facts concerning such a syndrome were made known to Counsel); *Campbell v. Coyle*, 260 F.3d 531 (6th Cir. 2001) (counsel's failure. to investigate and

discover Campbell's PTSD not ineffective when clinical psychologist failed to make such diagnosis), *Pruett v. Thompson*, 996 F 2d 1560, 1573-74 (4th Cir. 1993) (counsel's failure to investigate or present evidence of mental developmental problems, organic brain damage, and PTSD not ineffective where counsel consulted psychiatrist who concluded Pruett did not suffer from any of the, alleged mental illnesses or abnormalities); *see also Miniel v. Cockrell*, 339 F.3d 331, 345 (5th Cir. 2003) ("counsel is not constitutionally ineffective for insufficiently investigating a defendant's mental or psychological condition when there is nothing to put counsel on notice that such a condition exists").

17. Applicant's assumptions and conclusions, without any proof that he suffers from FAS, do not satisfy either *Strickland* prong. *See United States v. Turcotte*, 405 F.3d 515, 537 (7th Cir. 2005) (applicant must meet burden with more than unsubstantiated or conclusory statements).

18. Applicant cannot overcome the strong presumption that the representation provided by Ray and Gordon on this front fell within the wide range of reasonable professional assistance. *See Garza*, 738 F.3d at 681 (citing *Strickland*, 466 U.S. at 689).

19. Even if Applicant could establish deficient performance, he has not met his burden, to establish resulting prejudice. Presentation of an unsupported, double-edged mitigation theory based on FAS would not have shifted the balance

so as to cause the totality of the mitigating evidence to outweigh the State's powerful aggravating evidence. There simply is no reasonable probability that, but for the failure of Ray and Gordon :to investigate and present evidence of FAS, the outcome of Applicant's capital-murder trial would have been different.

20. The Court recommends that Applicant's fourteenth through seventeenth claims for relief be denied.

WHEREFORE, PREMISES CONSIDERED, the State prays that the Court adopt its proposed memorandum, findings of fact; and conclusions of law and that each of Applicant's claims for relief be denied.

Respectfully submitted,

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/s/
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[CERTIFICATE OF SERVICE AND PROPOSED ORDER INTENTIONALLY OMITTED]

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 17-70012

STEVEN LAWAYNE NELSON,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice, Correctional Institutions Division*,

Respondent—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:16-CV-904

ON PETITION FOR REHEARING EN BANC

Before JONES, SMITH, and DENNIS, *Circuit Judges.*

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

APPENDIX G

RELEVANT STATUTORY PROVISIONS

28 USC 2254: State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that-

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the

requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that-

(A) the claim relies on-

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other

reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

18 USC 3599: Counsel for financially unable defendants

(a)(1) Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either-

(A) before judgment; or

(B) after the entry of a judgment imposing a sentence of death but before the execution of that judgment;

shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in

accordance with subsections (b) through (f).

(2) In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).

(b) If the appointment is made before judgment, at least one attorney so appointed must have been admitted to practice in the court in which the prosecution is to be tried for not less than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court.

(c) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.

(d) With respect to subsections (b) and (c), the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

(e) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the

defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

(f) Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under subsection (g). No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.

(g)(1) Compensation shall be paid to attorneys appointed under this subsection 1 at a rate of not more than $125 per hour for in-court and out-of-court time. The Judicial Conference is authorized to raise the maximum for hourly payment specified in the 2 paragraph up to the aggregate of the overall average

percentages of the adjustments in the rates of pay for the General Schedule made pursuant to section 5305 3 of title 5 on or after such date. After the rates are raised under the preceding sentence, such hourly range may be raised at intervals of not less than one year, up to the aggregate of the overall average percentages of such adjustments made since the last raise under this paragraph.

(2) Fees and expenses paid for investigative, expert, and other reasonably necessary services authorized under subsection (f) shall not exceed $7,500 in any case, unless payment in excess of that limit is certified by the court, or by the United States magistrate judge, if the services were rendered in connection with the case disposed of entirely before such magistrate judge, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit. The chief judge of the circuit may delegate such approval authority to an active or senior circuit judge.

(3) The amounts paid under this paragraph 4 for services in any case shall be disclosed to the public, after the disposition of the petition.